United States Court of Appeals for the Second Circuit



JOINT APPENDIX

76-753層

United States Court of Appeals

For the Second Circuit.

YTZHAK HAREL.

Plaintiff-Appellet,

against

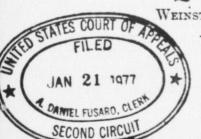
HARRY DIAMOND.

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOINT APPENDIX.

Barry, McTiernan, Moore & Siracuse
Attorneys for Defendant-Appellant
115 Broadway
New York, N. Y. 10006



Weinstein, Chayt & Bard, P. C.

Attorneys for Plaintiff-Appellee

26 Court Street

Brooklyn, N. Y. 11242

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

YTZHARK HAREL,

Plaintiff-Appellee,

against

HARRY DIAMOND,

Defendant-Appellant.

Relevant Docket Entries.

Date	Nr.	Proceedings
03-06-75 2-11-76 9-23-76	1	Filed Complaint & Issued Summons Fld Consent Pre Trial Order—Ward, J. Jury trial begun.
9-27-76		Trial continued & concluded. Total trial days (2). Jury verdict for pltff in the amount of \$75,00. Execution of judgment stayed pending appeal.
9-28-76		Fld Judgment #76,869—Ordered that jetff have judgment against deft in the amt of \$75,000—Ordered that execution of judgment is stayed pending appeal—R. F. Burghardt—Clerk mn
10-26-76		Filed defts notice of appeal to the USCA from the final judgment ent. in favor of pltff on 9-27-76 that said judgment is excessive. Copy sent to: Weinstein Chay & Bard, 26 Court St., Brooklyn, N. Y.

Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

YTZHARK HAREL,

Plaintiff,

against

HARRY DIAMOND,

Defendant.

Plaintiff, complaining of the defendant by his attorneys, Weinstein, Chayt & Bard, P. C., respectfully shows to this Court and alleges, upon and belief:

FIRST: That the plaintiff is a citizen and resident of the Nation of Israel.

SECOND: That the defendant is a citizen of the State of New York—maintaining a residence at Bronx County, within the jurisdiction of the United States District Court for the Southern District of New York.

THIRD: That at the time of commencement of the within action, the defendant maintains a residence at 1100 West End Avenue, Miami Beach, Florida.

FOURTH: That the matter in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.00.

FIFTH: That at the time hereinafter mentioned, the defendant was the owner and the operator of a motor vehicle bearing New York 1974 Registration Number 188 AEO.

SIXTH: That on or about December 24, 1974 on Fordham Road, at or near Creston Avenu Bronx County, City and State of New York, motor vehicle bearing New

Complaint

York 1974 Registration Number 188 AEO came into contact with the plaintiff.

SEVENTH: That the said occurrence was due solely and wholly to the negligence, recklessness and carelessness of the defendant in and about the want of due and proper care in the operation, maintenance, management and control of his said motor vehicle bearing New York 1974 Registration Number 188 AEO, without any negligence on the part of plaintiff contributing thereto.

EIGHTH: That as a result of the aforesaid occurrence, this plaintiff sustained severe injuries, including a serious injury defined in Subdivision 4 of Section 671 of the Insurance Law and economic loss greater than basic economic loss, as defined in Subdivision 1 of Section 671 of the Insurance Law; a severe shock to his nervous system and certain internal injuries and has been caused to suffer and for a long time to come will continue to suffer severe physical pain and mental anguish; and that some of these injuries are of a permanent and lasting nature; that the said plaintiff has been confined to a hospital, bed and home as a result thereof and has been caused to abstain from the duties of his vocation and has necessarily incurred expenses or obligation for medical care and attention and for medication, with further similar expenses anticipated, all to his damage in the sum of Five Hundred Thousand (\$500,000.00) Dollars.

WHEREFORE, plaintiff demands judgment against the defendant, together with the costs and disbursements of this action.

Dated: Brooklyn, New York March 6, 1975

WEINSTEIN, CHAYT & BARD, P. C.
Attorneys for Plaintiff
Office & P. O. Address
26 Court Street
Brooklyn, N. Y. 11242
858-3188

Answer.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Defendant, Harry Diamond, by the undersigned answering the complaint of the plaintiff, upon information and belief, states as follows:

Answering a first cause of action

FIRST: Denies having any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered and designated as "First."

SECOND: Denies each and every allegation contained in paragraphs numbered and designated as "Second", "Fourth", "Sixth"—(Except admits contact with someone on 12/24/74.) "Seventh", "Eighth."

Answering a second cause of action

THIRD: Answering paragraph repeats and reiterates each and every admission and denial heretofore made to paragraphs set forth therein with the same force and effect as if more fully set forth herein.

FOURTH: Denies having any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs numbered and designated as

FIF'TH: Denies each and every allegation contained in paragraphs numbered and designated as

Answer

As AND FOR AN AFFIRMATIVE DEFENSE:

The alleged injuries sustained by the plaintiff were caused solely by reason of his own negligence without the negligence of the defendant contributing thereto.

Wherefore, the defendant demands judgment dismissing the plaintiff's complaint herein, together with the costs and disbursements of this action.

Dated: Woodbury, New York April 21, 1975

Yours, etc.

FRANK A. DESANTIS
DESANTIS, McGarry, Totura & Hargous
Attorneys for Defendant
760 Woodbury Road
Woodbury, New York 11797
516-364-5800

To:

Weinstein, Chayt & Bard, P. C.
Attorneys for Plaintiff
26 Court Street
Brooklyn, New York 11242

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

- I. Stipulated Facts:
- 1. The plaintiff is a citizen of the State of Israel.
- 2. The defendant, at the time of the accident and up to the commencement of the within action, was a citizen of the United States, residing in Bronx County, New York State, within the Southern District jurisdiction.
- 3. On December 24, 1974 at approximately 8 A. M., the plaintiff was walking on the sidewalk of a triangular area formed by the intersections of Creston Avenue, East 190th Street and Fordham Road. In addition to the sidewalk, there are benches and trees on the island, but no buildings. At about this time, the vehicle of the defendant, the only vehicle involved in the accident, had been driven to the scene by one Martin Witzler, a son-inlaw of the defendant. The operator left the car facing in a northwesterly direction on Fordham Road at the northeast curb of East Fordham Road and East 190th Street. The defendant then commenced driving the car forward to make a right turn into Creston Avenue. In the process of that turn, the defendant drove the vehicle on to the sidewalk of the island, jumped the curb of the island, struck the pedestrian-plaintiff and then struck one or more of the benches on the island. Neither the plaintiff nor the defendant have any recollection of any warning being given the plaintiff of the approach of the defendant's vehicle.

II. Plaintiff's Contentions:

Plaintiff contends that jurisdiction of the defendant properly was acquired by service upon the Secretary

of State pursuant to Vehicle & Traffic Law §253; that there is diversity of citizenship warranting the Federal jurisdiction in that the plaintiff was a citizen of Israel, in New York as a tourist at the time of the accident out of which this action arises, and the defendant was a resident of and citizen of the State of New York at the time of the accident, which citizenship continued, and that the defendant at some time subsequent, no specific date having been mentioned in the answers to interrogatories, took up residence in the State of Florida.

With respect to liability, plaintiff contends that the defendant was negligent in failing and neglecting to maintain control of his motor vehicle, in permitting the said vehicle to go out of control, to mount a sidewalk where it struck the plaintiff without warning, all in violation of the statutes and regulations provided for the use of motor vehicles at the said location. Plaintiff has no recollection of being struck and suffers amnesia with respect to the circumstances immediately preceding and following the accident, although lack of knowledge as to the circumstances following the accident also can be attributed to a loss of consciousness. It is contended that this circumstance lessens the degree of proof required of the plaintiff with respect to the issue of liability. As to contributory negligence, the plaintiff was on the sidewalk at the time of the occurrence, had no warning of the approach of the defendant's vehicle and there is no possible issue of contributory negligence raised by the information exchanged prior to trial.

Plaintiff was removed by ambulance to Fordham Hospital, where he remained confined between December 24, 1974 and January 8, 1975. He thereafter was transferred to Trafalgar Hospital, where he was confined between January 8 and January 14, 1975 under the principal care of Dr. Robert Zaretsky, an orthopedist, having been seen in consultation neurologically by Dr. Murray

Budabin. The patient thereafter was seen at his office by Dr. Zaretsky until approximately the end of January, 1975. He was advised to and did wear a corset-type back support for the injuries suffered in the accident. It is contended that he had been in good health up to the time of the accident, and then was 21 years of age. The injuries he then had suffered as contained in the hospital records and the reports of his treating physicians were as follows:

- Cerebral concussion with post-concussion syndrome, manifested by frequent headaches and dizziness.
- 2. Post-traumatic amnesia.
- Fractures of the transverse process of L-3 and L-4 with secondary injuries to the nerves, tissues, ligaments and cells surrounding the area of the fracture site.
- 4. Fracture of the left 7th rib and cortical fracture of the left 6th rib, with secondary injuries to the nerves, tissues, ligaments and cells surrounding the area of the fracture site.
- 5. Contusion and blunt injury to the abdomen and injury to the spleen and kidney.
- 6. Contusions and tenderness of the right rib cage between the 8th through 12th ribs.
- 7. Contusions and tenderness of the left rib cage with diminished breath sound.
- Severe sprain with marked spasm of the lumbar spine with secondary injuries to the nerves, tissues, ligaments and cells surrounding the area of the sprain and spasm.
- 9. Contusion, hematoma and ecchymosis swelling of the left foot.

- 10. Contusion and sprain of the left ankle.
- 11. Contusion and abrasion over the left flank.

In addition, the patient quite naturally suffered the anxiety and concern for his future by reason of the injuries described.

Upon his return to his own country in the spring of 1975, the plaintiff, who had been discharged from the Israel Army after a full term of service just before coming to the United States as a tourist, sought employment. He found difficulty in activities and in performing the job he was able to obtain in the aircraft manufacturing industry in Israel. He consulted an orthopedic physician in Israel, Dr. Henri Horoszowski, who took further X-rays and who found, in addition to the lumbar fractures described at Fordham Hospital, wedgetype fractures of vertebrae T-4 and T-5, with narrowing or compression of the "left lateral wall", which he describes as "undiagnosed fracture of T-4-5 vertebrae due to the same accident".

Plaintiff contends that as a result of the injuries suffered in this accident that he has suffered permanent partial disability and loss of function.

This accident occurred subsequent to the announcement of the "No-Fault Law" in New York.

Expenses for hospitalization and medical care, as well as for the back support and ambulance service, have been covered in accordance with the provisions of that law, and no claim for these items of damage is made. It frankly is not anteipated that the plaintiff will have medical expenses exceeding the coverage provisions of "No-Fault", which are at least \$50,000.00. With respect to lost earnings, the plaintiff had not yet secured employment following his discharge from service, and while no claim has yet been presented for the delay in his obtaining employment following the accident by reason of the injury and his consequent total disability there-

after, this, too, would be presented through "No-Fault". A "serious injury" entitling the plaintiff to sue is claimed on two bases. One basis is that expenses for hospitalization and medical care have exceeded \$500.00 and that such expenses were reasonable, customary and necessarily rendered. The second basis of claiming the threshold is the issue of permanent partial loss of function of a bodily system or member, namely the spine, and in particular the vertebrae affected and their adjoining vertebrae, together with the consequent effect upon the surrounding soft tissue.

III. Defendant's Contentions:

The contentions of the defendants as set forth in his pretrial memorandum previously furnished are that "there may be no diversity of citizenship since it appears that the plaintiff resides in the City of New York and that the defendant was a citizen and resident of the City of New York and has recently relocated to Miami, Florida." Further, the defendant contends that the monetary jurisdiction of this Court is not met.

With respect to the liability and damages, the defendant states:

"While he was in the process of making a right turn, his vehicle came into contact with a pedestrian. The pedestrian later went to Fordham Hospital.

"Defendant contends the accident and any injuries sustained by the plaintiff were not caused by any acts of negligence on the part of the defendant and the defendant further submits that any injuries which may be alleged to have been sustained by the plaintiff were caused solely and wholly through the negligence of the plaintiff.

"2. The defendant contests damages and the extent thereto alleged to have been sustained by the plaintiff herein."

IV. List of Plaintiff's Exhibits and Defendant's Objections:

The exhibits intended to be offered on behalf of the plaintiff are as follows:

- Certain of the interrogatories and the responses thereto of the accident, including a copy of his MV-104 accident report, furnished pursuant to request.
- 2. Photographs of the scene of the accident.
- 3. The record of plaintiff's hospitalization at Ford-ham Hospital.
- Bill of Fordham Hospital (to establish the threshold requirement).
- 5. The record of plaintiff's confinement at Trafalgar Hospital.
- 6. Bill of Trafalgar Hospital.
- 7. A certified paid bill of Dr. Robert Zaretsky.
- 8. A certified paid bill of Dr. Murray Budabin.
- 9. X-rays of the plaintiff taken at Fordham Hospital and by Dr. Henri Horoszowski.
- 10. The written deposition testimony of the plaintiff Ytzhak Harel, unless said plaintiff can be produced for personal testimony at the trial.

Plaintiff knows of no objection to offer of the foregoing exhibits.

Plaintiff objects to the intention on the part of the defendant to offer the report of the physical examination of the plaintiff conducted by Dr. Samuel Cohen, reportedly dated April 21, 1975, both on the ground that no copy of such report has been furnished and on the basis that such report in itself constitutes hearsay.

- V. List of Plaintiff's Witnesses:
- 1. Ptl. Andre Brown
- 2. Ytzhak Harel*
- 3. Dr. Robert Zaretsky
- 4. Dr. Robert Tuby

*In order to bring the plaintiff to New York for trial, it is required and accordingly requested that plaintiff's counsel be afforded at least 14 days' advance notice of the date scheduled for trial. Depending upon the circumstances then existing, plaintiff would prefer to be present at his trial.

VI. List of Defendant's Witnesses:

The defendant has listed as his prospective witnesses Harry Diamond, Dr. Samuel S. Cohen and Martin Wetzler (sic).

VII. The Time Which Each Party Requires for Trial:

Plaintiff anticipates that the presentation of the direct plaintiff's case will occupy between 6 to 8 hours of courtroom time, in addition to time required for jury selection and opening and closing statements, plus the charge of the Court.

Plaintiff is without knowledge as to the time required by the defendant.

VIII. Issues To Be Tried:

Since liability is not conceded, this remains an issue to be tried.

In addition, there is the issue of the extent of the damages suffered and also whether the plaintiff meets the threshold requirement of a "serious injury" as defined by New York State law.

Respectfully submitted,

WEINSTEIN, CHAYT & BARD, P. C.
Attorneys for Plaintiff
Office and P. O. Address
26 Court Street
Brooklyn, New York 11242
By MAURICE CHAYT
a Member of the Firm

To:

Hon. Robert J. Ward, Justice,
United States District Court
DeSantis, McGarry,
Totura & Hargous, Esqs.
Attorneys for Defendant
750 Woodbury Road
Woodbury, New York 11797

Excerpts From Transcript.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Before:

Hon. Robert J. Ward, District Judge.

New York, New York September 23, 1976

Appearances:

Weinstein, Chayt & Bard, Esqs., Attorneys for the Plaintiff, By: Maurice Chayt, Esq., of Counsel.

Barry, McTiernan, Moore & Siracuse, Esqs., Attorneys for Defendant, By: George J. Siracuse, Esq., of Counsel.

(24) ANDREW BROWN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Chayt:

Q. Officer, how long have you been with the police department? A. Three and a half years.

Q. And on December 24, 1974, in the course of your duties with the New York City Police Department, where were you attached? A. To the 46th Precinct.

(25) Q. What type of duty did you have? A. 8:00 to 4:00.

Q. And were you assigned to a vehicle or on foot patrol? A. Vehicle patrol.

Q. You came on at 8:00 a.m.? A. That is correct.
Q. Officer Brown, did the 46th Precinct— A. 46th—

Q.—the 46th Precinct, to which you were assigned, does that include the area of Fordham Road and East 190th Street, that intersection? A. Yes, it does.

Q. Was it part of your duties to respond to any occurrence in that area? A. That is correct.

Q. Now, did you when you came on duty that morning have occasion to respond to a report of an accident, that is, the morning of December 24, 1974? A. Yes, I did.

Q. Were you present when the recident itself hap-

pened? A. No.

Q. How did you learn of it? (26) A. My artner and I were on patrol and we came upon an accident at Fordham Road.

The Court: Can you hear? Speak to the farthest juror. Try to keep your voice up so that everybody can hear.

A. While on patrol we came upon an accident at Fordham Road and Creston Avenue.

Q. Are you familiar with that intersection? A. Yes, I am.

Q. Do you pass it a number of times, other than that particular day? A. Yes.

Q. And that intersection involves three streets which

intersect? A. That is correct.

Q. What are those three streets? A. 190th Street, Creston Avenue and Fordham Road.

Q. Officer Brown, I show you these four photographs.

The Court: Mark them for identification, please, Counsel, before showing them to the witness.

(Plaintiff's Exhibits 1-A through 1-D marked for identification.)

Q. Officer Brown, I now show you the four photographs I mentioned, now marked as Exhibits 1-A through 1-D (27) for identification, and ask you whether these four photographs would be a fair and accurate representation of the intersection of those three streets and the safety island which was formed by those three streets as it appears on the date of the accident, with the exception of

the particular vehicles or people who happen to be in those photographs, which, I will state for the record, were not taken on the day of the accident. A. This is the correct location.

Q. Would they be a fair and accurate representation of the appearance of that intersection and the island located in that intersection? A. That is correct.

Mr. Chayt: I now offer the four photographs in evidence.

Mr. Siracuse: No objection.

The Court: Received.

(Plaintiff's Exhibits 1-A through 1-D, inclusive, respectively; received in evidence.)

(Plaintiff's Exhibit 2 marked for identification.)

Q. Officer Brown, I show you this diagram, and omitting the words "work sheet" which is a personal reference, this sheet itself being marked Exhibit 2 for identification, I ask you whether that diagram would be a (28) reasonable, fair representation and fair proportion of the area we are talking about involving this island? A. That is correct.

Mr. Chayt: I offer this.

Mr. Siracuse: May I have a voir dire?

The Court: Yes.

Voir Dire Examination by Mr. Siracuse:

Q. Officer, did you make a diagram yourself of the occurrence at the time you were there? A. No, I didn't.

Q. Had you ever seen this diagram before? A. No, I have not.

Mr. Siracuse: Your Honor, there are some markings on this diagram.

Mr. Chayt: No objection to the elision.

The Court: Is there any objection to the diagram, exclusive of the markings?

Mr. Siracuse: May I ask one further question: Is this diagram purported to be of scale?

Mr. Chayt: Not exactly.

Mr. Siracuse: I have no objection with that and the removal of the markings.

(Plaintiff's Exhibit 2 for identification received (29) in evidence.)

The Court: Before it is shown to the jury, will you remove the markings?

Mr. Siracuse: Is it agreed what purports to be automobile sketches has nothing to do with the time of the accident?

Mr. Chayt: Yes. There are markings of vehicles in the roadway here which it is stipulated in no way indicate what vehicles were in the roadway at the time of this accident. They just indicate the directions of travel.

Mr. Siracuse: Whatever markings are on there I think are innocous.

Direct Examination (Resumed) by Mr. Chayt:

Q. Officer, on the diagram, which is Exhibit 2 in evidence, we have a marking of Creston Avenue and another marking of Fordham Road, but no marking as to this street to which I am pointing. What street is that? A. 190th Street.

Q. Will you mark East 190th Street along there so that when the jury looks at that they will have no doubt about which streets we are referring to? A. This street here going north.

A. This street here going north.

The Court: Just mark next to that East 190th (30) Street so we will know what streets they are.

Mr Chayt: May I show this to the jury so they will have some knowledge of what we are talking about?

The Court: You may.

(Plaintiff's Exhibit 2 given to the jury.)

Mr. Chayt: May I also give the photographs?

The Court: You may.

(Plaintiff's Exhibits 1-A through 1-D given to the jury.)

Q. Officer Brown, could you please place an H for Harel on this diagram at the position in which he was when you arrived?

Mr. Siracuse: Objection.

The Court: Sustained. You will have to lay a foundation.

Q. Officer, when you got there to the scene did you observe the vehicle at the scene? A. Yes, I did.

Q. And where was this vehicle? A. In the middle of

the diamond.

Q. I heard you say diamond. A. Yes, the little island is made like a diamond.

Q. I would refer to it as a triangle. A. Yes.

(31) Q. Where was the car with respect to the curbs of that diamond or triangle? A. It was in the middle facing the benches from the opposite side.

O. It was facing toward which street? A. Creston

Avenue.

Q. Was any part of that car on the roadway? A. No, it was not.

Q. The entire car was up on the island? A. That is

correct.

Q. I show you Exhibit 1-C in evidence and I ask you if there is some building or object in this photograph toward which that car was facing? A. Yes.

Q. What is that? A. The First National City Bank.

Q. Could you on the diagram write just the number 1 where the bank would be on that diagram? I am referring to Exhibit 2.

The Court: Is this the only bank you are going to be talking about?

Mr. Chayt: Yes.

The Court: Just have him put down "Bank."
The Witness has completed inserting the word
(32) "Bank."

Q. Now, then, sir, where was Mr. Harel in relation to the car?

Mr. Siracuse: Objection. No proper foundation.

The Court: That is correct.

Q. In addition to the car, what, if anything, did you observe? A. I observed the plaintiff lying on the sidewalk in the middle of the island.

The Court: You observed a man lying on the sidewalk?

The Witness: Yes.

Q. Did you obtain his identification? A. Yes.

Q. What was the name of that man? A. The name I got was Ytzhak and the last name was Harel.

Q. Now, sir, you are saying the far that you observed was entirely on this triangle facing the bank which is on the Creston Avenue side of the island? A. Yes.

Q. Toward which street was the back of the car facing? A. The back was facing 190th Street.

(33) Q. Now, when you first saw Mr. Harel, where was he lying in relation to the car? What was the nearest point of the car to him? A. I would say about three feet.

Q. He was about three feet from what part of the car, so we can get a mental picture? A. From the left front wheel.

Q. Where was the left front wheel of the car? Was it in contact with any object? A. It was on top of a park bench.

Q. And these were benches facing what street? A. Creston Avenue.

Q. When you first observed Mr. Harel, can you recall his physical position? ____ as lying on his back on the sidewalk.

Q. Now, sir, do you recall his mental status at that time?

Mr. Siracuse: I object. The Court: Sustained.

Q. Do you recall what you observed with respect to him at that time, other than the fact that he was lying on his back? A. He was n shock.

Mr. Siracuse: I object.

(34) The Court: Yes.

Did you go to speak to him?

The Witness: Yes, I did.

The Court: Did he respond?

The Witness: No reply.

(48) SAMUEL S. COHEN, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Mr. Siracuse: I understand there has been filed with the Court a report of Dr. Horoszowski, I think.

Mr. Chayt: A deposition, you mean.

The Court: That is correct. I have a document here which I think is the one to which you refer.

Mr. Siracuse: Unless counsel has another copy. Do you have another copy I can use?

Mr. Chayt: Yes.

The Court: The original is here, and I note that it was filed on March 19, 1976.

Direct Examination by Mr. Siracuse:

Q. May we have your full name? A. Samuel S. Cohen.

Q. Are you a physician duly licensed to practice (49) your profession in the State of New York? A. I am.

Q. Would you tell the Court, please, and the jury, your background, your professional background, beginning from whatever school you graduated and whatever particular field of medicine you are engaged in, sir? A. Well, I am a graduate of the New York Medical College in 1937. I then spent the next two years as a rotating intern at the Metropolitan Hospital. I then spent the next year as a resident surgeon at the Goldwater Memorial Hospital, followed by the next year as chief resident surgeon, followed by the following year as the chief resident orthopedic surgeon in fractures at the Metropolitan Hospital. I served in the Army of the United States: I have been on the faculty of the New York Medical College for approximately 32 or 33 years; I hold the rank of Associate Professor of Orthopedic Surgery. I am a diplomate of the American Board of Orthopedic Surgery. I am a Fellow of the American College of Surgeons: I am a Fellow of the International College of Surgeons: I am a member of the American Academy of Orthopedic Surgeons: I am an attending orthopedic surgeon at the Flower-Fifth Avenue Hospital and the Metropolitan Hospital. I have served as an impartial orthopedic specialist on occasion for Federal agencies and (50) for the Supreme Court in Brooklyn, as well as the Workmen's Compensation Board in New York.

I am also a member of the New York and Brooklyn Regional Committee of Trauma of the American College of Surgeons.

Q. Doctor, you used the phrase "orthopedic surgeon." Would you tell us specifically what that means? A. Well, it is surgery which has to do with the preservation of function. It takes up bones, muscles, tendons, joints and all the associated structures that go with it, including the nerves.

Q. Does the spinal column, sir, come within your spe-

cialty? A. It does.

Q. Sir, pursuant to the request by the representatives of the defendant and did there come a time when you made a physical examination of the plaintiff, Mr. Ytzhak Harel, in this case? A. I did.

Q. Can you tell us what date that was, please? A. On

April 18, 1975.

Q. After having made this examination, sir, did you reduce your findings to a report? A. I did.

(51) Q. Do you have a copy of that report in front of you? A. I do.

Q. Did you ever see this particular patient or person before or after that date? A. No, never did.

Q. Did you have any X-rays presented to you? A. No, I did not.

Q. Did the plaintiff's attorney accompany the patient to your office or did he go alone, sir? A. No, I think he was with him. He was not by himself. Somebody was with him. I don't recall who it was.

Q. Were any X-rays brought to you for your review at that time by the plaintiff? A. No, sir.

Q. You did a physical examination, though? A. I did.

Q. Can you tell us, please, sir, what your findings were as far as your physical examination is concerned? A. Wel, this was a 22-year-old male. He said he was a dental technician. I asked him to walk. He was able to walk without a timp. I examined his head. I did not find any abnormality.

(52) Eyes—pupils were equal. There was no nystagmus or deviation, no shifting of the eyes.

Q. Was that significant to you, sir? A. It would be.

Q. All right. A. I had him put his tongue out. It was in the mid-line, and there was no deviation. We tested him with what is known as a Romberg test and that was normal.

Q. Before you examined him, of course, you were presented with certain information as to what he claimed that particular injury was? A. Yes.

Q. And you were examining specifically to determine the extent and projection of that particular injury? A. Yes.

Q. And the residuals? A. Yes.

Q. What injuries were you told at that time he was suffering from? A. Cerebral concussion with post-concussion syndrome manifested by frequent headaches and dizziness, post-traumatic anemia, fracture of the transverse process of L3 and L4 with secondary injuries to the nerves, tissues, ligaments and cells surrounding the area of the sprain and (53) the spasm; fracture of the left seventh rib and cortical fracture of the left sixth rib.

Q. You were told that he was claiming, sir, that he had, among other things, a fracture of the transverse

process of L3 and L4? A. That is right.

Q. Will you tell us what does L3 and L4 mean? A. Well, the body has several sections of the spine, starting with the neck and running down to the tail bone, and the neck part is called the cervical region, the back, upper part of the back is called the dorsal or thoracic, which means chest, and the next part, which is the middle of your back, is called the lumbar, the lumbar vertebra, which are the bones making up that part of the lower back, and jutting out from each side of the body of the vertebra are what is known as a transverse process. They come out from each side of the vertebra.

So that if you want to identify where a certain thing occurs, you would say "lumbar," meaning in the lumbar region, Lumbar 3, meaning the third lumbar vertebra. There are five. And then you would say transverse process. And then you should add L or R, meaning left transverse process, or right transverse process. It looks like two points extending out on either side of the body of the vertebra.

(54) Q. Do these transverse processes have any function? A. Well, the function of a transverse process, it is a means of strengthening the muscles that run up and down the spine nerve, which sort of attach to the transverse processes.

Q. Did they have any weight bearing function, sir? A. Weight bearing? Basically not.

Q. Now, Doctor, would you tell us, did you note Mr. Harel's weight at the time? A. 185 pounds.

Q. And height? A. Five feet ten.

Q. I think you told us he was a dental technician. A. That is right.

Mr. Chayt: Objection.

The Court: Yes, that was a leading question. The doctor is your witness.

Mr. Siracuse: Well, he said that, sir.

Q. Did you check his gait, sir? A. I did.

Q. What do we mean when we use the word "gait"? A. Walking.

Q. What did you find about that? A. He was able to walk normally.

(55) Q. Was there any limp? A. No.

Q. Did he favor either of his lower extremities? A. He did not.

Q. Did you examine his head? A. I did.

Q. What did you find? A. No abnormality.

Q. How about his eyes, sir? A. They were normal in appearance.

Q. And you already told us something about the tongue before? A. Right.

Q. You used the word Romberg or the phrase Romberg test before. What is the Romberg test? A. Well, this is a test for cranial injury, in which a patient closes his eyes and may sway or fall, and this is a test to determine whether or not there is any serious intra-cranial head injury.

Q. Did you check his neck, sir? A. I did.

Q. What did you find? A. I did not find anything that was abnormal. He had complete range of motion of the neck with no (56) complaints on any movement of the neck.

Q. Did you do a neurological examination, sir? A. I did.

Q. Of the upper extremities? A. I did.

Q. What did that entail? A. Well, it actually consisted of using my percussion hammer to get the reflexes for the upper extremity and then using a pinactually, it is a little blunter than a pin—to determine sensation.

Q. What is this for? What are you looking for or not looking for when you do that test? What are you trying to exclude or include? A. Well, you are trying to determine whether or not there has been any alteration from the neurological point of view.

Q. You used the words "neurological point of view."

A. From any point of view.

Q. And does that include nerves or running from where to where? A. Oh, it includes the upper extremity, the nerves that run out from the neck into the arms.

Q. Did you check the back, sir? A. I did.

(57) Q. What did you find or what didn't you find? Tell us what your findings were. A. I examined his back and he had no spasm, no pelvic tilt; he was able to flex completely.

Q. What does that mean? A. Bend forward, and he said he had discomfort in this movement. He extended completely with a complaint of discomfort, and he was able to bend to both left and right and twist his body to both left and right.

Q. Did you experience or measure in some other way the range of motion in these bending operations? A. Well, it was not measured in degrees. I have been doing this for a long time and it is a clinical evaluation. So that when I say complete forward flexion, it is to 70 or 80 degrees forward.

Q. Did you find any limitation of motion? A. I did not.

Q. Did you examine the chest, sir? A. Yes.

Q. What were your findings? A. He did not have any deformity, but there was tenderness when I felt the left lateral chest wall. That is the side of the left chest.

Q. What else? (58) A. But there was no crepitus. That means, there was no crackling sound of bones rubbing against each other.

He was able to breathe completely; what we call respiratory excursions were complete.

Q. Did you examine him while he was in the supine position? A. Yes.

Q. What does that position entail? A. Well, supine means like being on your back face up, and the test, part of it, is to determine whether or not there is any shortening one side as compared to the other. There was no shortening. And then to determine if there was any muscle wasting by measurement, and there was not any. And then—

Q. Sir, was there any-

The Court: I don't think that the doctor finished. He said, "And then."

Do you have more than you want to add, Doctor?

A. Well, while in this very position, while the patient was lying on his back, as part of this examination you ask him to raise his leg straight up in the air, and that is called straight leg raising, meaning that if you have some involvement of the sciatic nerve, when you raise the leg straight up in the air you are putting it in a stretch, (59) so that it would be painful. And, of course, if it is painful or restricted, it is called positive. But in this case there was no response to straight leg raising, and so this was negative.

The other part of it would be to determine whether or not there is any weakness in dorsi-flexion, that is, bringing your foot up, your foot back. If there were nerve involvement of a certain type, then you could not bring that foot back, or you would have weakness in bringing it back. But here there was no weakness.

While I had him in this position, of course, I examined his left ankle and his left foot. There were no findings, with the exception of the fact that on palpation, that is, touching the other side of the left ankle, it was tender.

And while he was on his back, I examined his abdomen, and I could not find any areas that were tender in his abdomen.

Q. Will you continue, Doctor, please? A. Then I asked him to turn from the supine, that is, from lying on his back, to the prone, which is lying on his face.

Q. What he able to do that, sir? A. He did that without any difficulty. And in this (60) position he did not have any spasm in the upper or lower back, and there were no tender or painful areas that I could elicit.

I then did a neurological examination of the lower extremities, which is similar to the one that is done to the upper extremities, and that is to test his knee jerks and ankle jerks to determine whether there is any alteration in sensation.

The Court: What were your findings? The Witness: That was normal.

Q. Doctor, these findings, these neurological tests being normal, was that of any significance to you, sir? A. Well, its significance was that if there were or if there had been any kind of neurological trauma, it did not manifest itself in any sort of objective findings that one could see.

Q. You used the word "neurological" again. A. If there had been anything wrong from the point of view of injury to the nerve or the body, which resulted in something that was lasting, then it would have been picked up by virtue of the examination of the arms and legs.

Q. Now, you saw the Fordham Hospital records, did (61) you not? A. Yes.

(Defendant's Exhibit B marked for identification.)

Mr. Chayt: Those are the records I subpoenaed. Maybe I should mark them. I offer so much of the record as relates to the diagnosis and treatment and care.

The Court: Received. No objection. (Defendant's Exhibit C received in evidence.)

Q. Sir, was there any history in the hospital record at Fordham with respect to the consciousness or loss of consciousness with respect to the plaintiff or patient at any time? A. In the physical examination on his admission it states 21 year old male was admitted to this hospital—I think this means via emergency room—because of him being in a motor vehicle accident. The patient got hit by a car and fell down. No loss of consciousness, no nausea, no vomiting.

O. With respect to consciousness, sir, is at all? A. Yes.

Q. Doctor, when you were sitting here waiting to be called, did I hand you--

Mr. Siracuse: This is going to be a little (62) difficult. I am anticipating the plaintiff putting this in evidence.

Mr. Chayt: Maybe we can stipulate. I know it is a little difficult.

Mr. Siracuse: There may be a portion of this deposition that I may want to object to as to the particular question and answer.

The Court: Why don't you work it out between yourselves?

Q. I have already shown you a deposition taken of Dr. Horoszowski. A. Yes.

Q. I told you, sir, and with your permission, that Dr. Horoszowski is alleged to be a doctor in Israel who examined the plaintiff in this case. A. Yes.

Q. Sir, with respect to arthritis, what can you tell us about arthritis as far as people with advancing age? A. Well—

Q. I know that is put rather crudely, but you know the tenor of my question? A. Well, it is kind of a general question. Arthritis—there are various types of arthritis. The arthritis of wear and tear affects everybody in the population. (63) Arthritis that comes as a result of injury has to be in an area where there is a joint, joint arthritis. I think I have sort of covered it that way.

Mr. Siracuse: May I have these marked? (Defendants' Exhibits E-1, E-2, E-3, E-4, and E-5 marked for identification.)

Mr. Siracuse: May I ask counsel to concede that these are the X-ray films that were presented by counsel to the court?

Mr. Chayt: I might state the circumstances. We took a deposition of Dr. Horoszowski in Israel and he referred to X-rays in the deposition and was asked to attach the X-rays to which he referred in the course of that deposition, and these are the X-rays which were sent to the court with the original deposition that your Honor referred to as having been filed with the court. They came directly from Israel.

Mr. Siracuse: That satisfies my purpose.

The Court: Do you object?

Mr. Chayt: No.

The Court: They will be received.

(Defendant's Exhibit B-1 through B-5, inclusive, received in evidence.)

(64) By Mr. Siracuse:

Q. Doctor, would you look at those, sir? A. I just might say in passing that our X-rays are negatives, so that if you look at a part that is of greater density than the surrounding one, it will appear white, just like you will take a photograph. Of course, this is the reverse: this is darker. So, therefore, I conclude that this may be a copy. I am not quite certain that it is or is not.

The Court: Are you familiar with the X-ray procedure methods used in the State of Israel?

The Witness: No.

The Court: Very well, I am not. In any event-

A. This is a picture, an X-ray, and I will say we would see the areas that would ordinarily under ordinary circumstances would appear as being white because of the density of bone, here appear dark. So that I have to sort of alter my experience with the appearance of it. So it is for that reason that I think that these are copies.

Now, when we do this thing here and we make the

copy and it is a copy on paper, then it would come out this way, that is, on developing paper. So if you took an X-ray where you have a negative and now you are making a positive out of it, so when it appeared, it would appear on newly (65) developed paper, you know it is a copy, a paper copy, and it would appear thus.

Mr. Chayt: What is the significance?

The Witness: The significance is that this is not in the ordinary run of X-ray that you would see in this country of any other art of the world, for that matter. So it would seem to me that this must have been a copy of sorts.

Mr. Chayt: May I have a voir dire, a question or two?

The Court: Yes.

Voir Dire Examination by Mr. Chayt:

Q. And this is- A. All of them are that way.

Q. The one you have on the shadow box is what? A. B-4.

Q. Are you telling us that because of the appearance of this X-ray you are unable to interpret it? A. No. I did not say that.

The Court: All he said, it might be a copy, and I don't know that that has any great significance. It is in evidence.

Doctor, is there something that you see here (66) which is in any way altered, changed or whatever?

A. Not really, except for as I go on, the other numbers that I have looked at before, I would not consider those X-rays as acceptable, in other words, acceptable from a technical point of view. In any event, this is an X-ray of the lumbar spine, which is a lateral view.

The Court: We are back to B-4?

The Witness: We are back to B-4, yes. This X-ray indicates the lumbar vertebra to be well outlined, and I see on this X-ray no indication of any pathology.

The Court: By "this"-

By Mr. Siracuse:

Q. What does that mean? A. I see nothing which is diseased or not right.

Q. What area did you say that was? A. Lateral lumbar; that means it was taken from the side; this is the patient standing, from the side. I selected this one.

The Court: Would you identify it by letter and number?

The Witness: Yes, this is B-1.

Now, this X-ray is an X-ray which is known as an anterior-posterior view, looking forward from the abdomen to the back. And there is a marking L, meaning left. And if you look at the points that come out on each side of this (67) body, you see these black points on either side, and they are transverse processes, and if you count down, this is the first lumbar, second lumbar, third lumbar, fourth lumbar. So if you look at that, you will see that the third lumbar and fourth lumbar transverse processes on the left reveal the fracture.

Q. Is there any other area other than the lumbar area shown in that X-ray? A. It shows some of the lower ribs. I should say that I cannot see any fracture in these lower ribs. This is the last rib, which is the 12th rib. So it is 12, 11, 10, 9, and you can't see a fracture there.

Mr. Chayt: We are not claiming a fracture of any of those ribs, in any event.

The Court: What exhibit are you reading?

The Witness: This is Exhibit 5. Now, this is an oblique view. In other words, instead of it being directly from the side, the person's body is turned at

roughly a 45-degree angle, so it was taken from the side and the X-ray is directed with the person in an oblique position.

I cannot see any pathological process in this view.

Q. That is the lumbar area? (68) A. The lumbar area. Now, this is another oblique, but taken from the opposite section.

Q. What number is that, sir? A. B-2, and the other one was taken from one side, and this is taken from the other. And I can't see any pathological process in these X-rays.

Q. Is that limited to the lumbar area, sir? A. Yes. I think I ought to read the date on this. It would be 9-18-75 on all of them.

The Court: As I recall it, the accident happened on December 24, 1974?

Mr. Siracuse: Yes. Mr. Chavt: Yes.

The Court: The exhibit number before you started to testify, Doctor?

The Witness: This is Exhibit B-3. Now, what this is is an X-ray, what is known as an anterior-posterior view of the dorsal spine. That is the upper part of the back or thoracic spine. Now, in this view there is noted a slight curve, in other words, instead of being straight, there is a slight curve, and that slight curve has as its apex, that is, where its greatest curve is, I would say that I cannot say the exact number, but I believe this (69) appears to be the fourth or fifth dorsal vertebra. The reason I can't say that is because the particular quality technically of the X-ray is not good. But if you look closely here you do see that one of the bodies is slightly wedged as compared—

The Court: Doctor, I think some of the jurors are having difficulty seeing the X-rays as you testify.

A. (Continuing) If you look at this X-ray, in other words, it should be straight up and down, but there is a little curve to it, so that it curves over here. I think that is meant to me the letter R, meaning that the curve, the convexed goes toward the right. There is a slight wedging here of this body, which I felt, which I think is either the fourth or fifth dorsal vertebra. I can't be certain. There is a slight wedging of it.

In other words, if you look right across here, you will see that this is slightly down on this side as compared to the opposite side. It is slight. But I must add that this is something that we see when we have a spinal curvature. It is not due to injury. The curve is very slight here. It is a developmental type of thing in growth. It is really very slight, and one can see that slight wedging on one side. Unfortunately, in none of these X-rays is there a lateral view, that is, a view of (70) this part of the back, from the side. So I can only see it from this point of view, from the front.

Q. Let me interrupt you, Doctor. You say that whatever you see as far as the spinal curvature is concerned, that is not due to injury? A. No, it is due to a developmental curvature, which is known as a scoliosis.

Q. Is there any way you can from looking at this tell us the age? A. Oh, I would say, not by looking at it, but you can only determine that sort of approximation by the age of the patient. He is 22; we might say that he achieved his growth period at 16 or 17 years of age, so that it would have had to be present anywhere from seven, eight, nine, ten years.

Q. Then you would say that that condition, this curvature there, the little wedging, pre-existed the date December 24, 1974? A. Yes.

Q. You say that unequivocally? A. I do.

Q. Now, Doctor, let's go back to the arthritis. Can people expect to develop arthritis in the various portions of their body; and, particularly, in the spinal (71)

column and cervical area and lumbar area due to the

aging process? A. Yes.

Q. Would you say that most people by the time they get to be 40 either have it or on the threshold of having arthritis in some of these areas? A. Well, let's say most people past 40.

Mr. Chayt: Your Honor, I have an objection. I don't know what he means most people by 40.

The Court: The question which was asked has already been answered. I am going to let the answer stand.

Q. Doctor, I am going to ask you to assume that this plaintiff, aged approximately 21 years, was involved in an automobile accident, that he suffered in this automobile accident a fracture of the transverse processes, that is, L3, L4, left side, I think you said. I am going to ask you further to assume that after some months after this accident occurred this patient worked as an airplane mechanic, lifting heavy objects, crawling in rather narrow spaces, et cetera, and worked apparently steady with no incident. I am going to also ask you to take into account your findings upon physical examination of this patient at the time you examined him on April 18, 1975, and which you just now reported upon to this court and jury.

(72) I am going to ask you whether you have an opinion with a reasonable degree of medical certainty as to the

prognosis with respect to this patient.

Mr. Chayt: I am going to object in that there are many facts that counsel, I believe, is capable of putting into evidence and which were not put into evidence.

The Court: That part of the question with respect to working as a mechanic and crawling into small spaces without incident, do you have proof

to support that particular portion of your hypothetical? If so, I would allow the question. However, if you are not able to make that representation, I suggest to you that you'd best rephrase the hypothetical.

Mr. Siracuse: What I was intending to say is from what I have read and from what I am anticipating. I know this is cumbersome, I think you understand that—

The Court: Don't make any speeches. Try to work directly from the materials which you have seen, including the depositions, and if you have language directly from a deposition, you might utilize it. I see here the deposition of Mr. Harel, question and answer 63. You may not want to use that. But that is the thing that seems closest to where the objection is centered. Unfortunately, there is an off-setting statement there.

(73) Q. Well, sir, strike out "without incident," because, frankly, I have difficulty with that myself, and include in the question the fact that—

Mr. Chayt: May we have it restated, please?
Mr. Siracuse: I withdraw it. I think it would
be easier. I agree with counsel.

Q. Doctor, I ask you to assume that the patient was examined on April 18, 1975, Mr. Ytzhak Harel, was involved in an automobile accident on December 24, 1974, wherein he suffered fractures of the transverse processes L3, L4. I would further ask you to assume your findings upon your physical examination on April 18, 1975, and I further ask you to assume what you have seen from these X-rays taken by Dr. Horoszowski. I further ask you to assume that the plaintiff some two or three months after returning to Israel worked as an aircraft mechanic, which work required him to crawl into tight spaces and to work bent over and sometimes to lift

heavy equipment. I further ask you to assume that the patient served 35 days in the Army in Israel and in the reserve activity duty after this accident, and that his duties were driving an armored vehicle and operating a radio. I ask you to assume those facts.

Assuming those facts, do you have an opinion with a reasonable degree of medical certainty as to the (74) future of this patient? A. Yes, I do have.

Q. What is that, sir? A. I will say the prognosis is

good.

Q. Is there any relationship, sir, between the transverse process fracture and any possibility of arthritis? A. Transverse processes? No.

Q. None whatsoever? A. No.

(75) Q. Do you give as a medical opinion, sir, that the fractures you found, you describe, I should say, and have seen in the X-rays that you just told us about would not be in and of themselves a competent producing cause of arthritis? A. No.

Q. Sir, do you agree or disagree that this gentleman has here 20% physical disability? A. Well, I can only say what I found when I examined him on the date I examined him. It was most minimal, most minimal. He was able to bend completely and he just had the complaints of discomfort, and on the basis of his complaints and on the basis of the type of fractures he is said to have suffered, I felt that he had a minimal type of partial disability. But I cannot grade a disability of that type. I would seem to me that even if we were to grade it on some basis, which we don't do, but even if we were to grade it on a percentage basis, it would seem too high to me. It would mean that it is one-fifth of his ability to move his back or to perform.

Now, I would say that that is quite high, that is, I

would say generally speaking.

Q. Doctor, have you seen any X-rays, have any X-rays been presented to you with respect to the rib cage (76) other than those already presented to you? A. The only

X-ray was a single plate here in which I could not distinguish a fracture.

Q. How about the sixth or seventh ribs? A. You can't distinguish a fracture there. All I have to go by were the X-ray reports.

Q. What are you referring to? A. Well, in the X-ray

report taken at the Fordham Hospital.

Q. Are you going to read something to us? A. I am not going to read it. I am going to perhaps just say that there is a radiologist's report regarding the left seventh rib, which is not an exclusive type of report. So I can't say as far as the rib fractures are concerned.

Mr. Chayt: May I have a voir dire to locate the page, just so I can tell? There is a numbered circle at the bottom.

The Witness: 23.

The Court: Is that sufficient, counsel? Mr. Chayt: Yes.

By Mr. Siracuse:

Q. Doctor, you are looking at the Fordham Hospital record? May I have the exhibit number so that the (77) record will be clear, sir? A. Three.

Q. Is that the page there that reads final diagnosis?

A. Yes, sir.

Q. Read the final diagnosis, please. A. Fracture of the transverse process left 4th and 5th lumbar vertebra.

Q. That says 4th and 5th? A. Yes.

Q. Do you agree with that, sir? A. No, it is 3rd and 4th.

Q. Anything there about any rib fracture in that final diagnosis? A. No.

Mr. Siracuse: Thank you, Doctor.

I have no further questions.

The Court: You may inquire, Mr. Chayt.

(Recess.)

The Court: You may proceed, Mr. Chayt.

Cross Examination by Mr. Chayt:

Mr. Chayt: If your Honor please, we have the deposition of Dr. Horoszowski, and if I may out of turn at (78) this point for the purposes of comparing Doctor's Cohen's testimony refer to question 40 and if I may read that, your Honor, and then ask the doctor to identify in the photos here:

"40Q. Please described each X-ray film on this patient as to (1) the date taken, (2) the area examined and (3) the view or angle of exposure, designating each film at the outset of your description by a distinct number. A. All of these films were taken on September 18, 1975. Photographed onto the films in the usual manner are the name of the patient, the date taken and the name of the doctor by whom taken, in this case Dr. N. Shakin.

X-ray Institute. Film #1 is an anterior-posterior view of the thoracal region. Film #2 is an anterior-posterior view of the lumbar spine and lower thoracal region. Film #3 is an oblique view from the left of the lumbar spine. Film #4 is an oblique view from the right of the lumbar spine. Film #5 is a lateral view of the lumbar spine.

"41Q. If you have the X-ray films before you, identify each one by marking it with the number assigned by you in the previous answer? A. (Physically done by the witness, numbers (79) 1 to 5 inclusive marked with a black marker pen."

Q. Now, Doctor, are you able to distinguish those numbers so that we can identify which X-rays Mr. Horoszowski is referring to in reference to Exhibits 1 thru 5 which that you have identified? Do you see any such? Do you have the shadowbox there with the light? A. I know what they are.

Q. Frankly, if you don't see the numbers. A. Well, this one I don't have the number, but I can identify each one by the description.

Q. Let's take number one, the anterior-posterior view of the thoracal region. A. That would be this.

Q. He has got that marked? What is that V? Roman five? Maybe that is a seven. A. This is B3.

Q. Can you note a number one in the circle some place? Try the upper left-hand corner with this pencil, please? Is that N1? A. Yes.

Mr. Siracuse: One is what has been marked on this trial as B3.

Q. Now, number one is the anterior-posterior view (80) of the lumbar spine and lower thoracal region. A. That is marked B1.

Q. So, in any event, B1 is the equivilant of what he refers to as N2.

Now, number three, that he refers to as an oblique view from the left of the lumbar spine. A. I have to do that by inference because one oblique view is marked right. The other one would have to be left. All right, that would be B5.

Q. And number 4 is an oblique view from the right of the lumbar spine? A. B2.

Q. And five would have to be N4 by process of elimination? It is a lateral view of the lumbar spine? A. No, that is B4.

Q. Lateral view of the lumbar spine? A. No, there is another one here, too. It is supposed to be ribs. This is the one that we have not talked about. There is no number on it.

Mr. Siracuse: Is there a sixth one?

The Witness: Yes. I don't know what it was meant to be. I think it was meant to be ribs.

Mr. Chayt: So we now have six X-rays. Let's mark that B6.

(81) (Defendant's Exhibit B-6 marked for identification.)

Mr. Siracuse: Is reference made to B6 in Doctor Horoszowski's deposition?

Mr. Chayt: It is an extra film that is referred to.

The Court: Do you know where it came from?

Mr. Chayt: It came, I would assume, with all
the other X-rays.

The Court: It is merely for identification. If at any point one or the other wishes to offer it. you may.

Mr. Siracuse: Just for identification.

The Court: Yes. It is not in evidence.

Q. Doctor Cohen, you examined the plaintiff in this case, Mr. Harel, on April 18, 1975? Is that correct? A. Yes.

Q. That was done when he came to your office? A. Yes.

Q. Now, at that time the purpose of your examination was to evaluate this case at the request of the representatives of Mr. Diamond? A. Right.

Q. You were not undertaking in any way to give a (82) report of the examination of Mr. Harel?

Mr. Siracuse: I object to the form of the question.

Q. Was this in any way related to the treatment of Mr. Harel?

Mr. Siracuse: Object to the form of the question, your Honor.

Q. Did this examination have anything to do with his treatment? A. No, sir.

Q. Now, sir, your responsibility in this case was to make a report, which was done? A. Yes.

Mr. Siracuse: I object to the form of the question and ask that it be stricken.

The Court: Rephrase your question.

Q. When you undertook this examination did you do so with a view to furnishing a report to the representatives of Mr. Diamond?

Mr. Siracuse: If you add to that in accordance with the rules of the court and furnishing you with a copy of the same, I have no objection.

Mr. Chayt: I do object to that. I didn't get a

(83) Mr. Siracuse: I did give you a copy. Mr. Chayt: Today.

By Mr. Chayt:

Q. Did you make that examination so that I could get a copy of it, Dr. Cohen?

Mr. Siracuse: Objection. The Court: Please.

Q. Dr. Cohen, did you examine this page at the request of the attorneys for Mr. Diamond? A. Yes.

Q. Had you ever known of Mr. Harel before that examination? A. Never saw him before.

Q. When after the examination did you prepare the report? A. Oh, I would say the report itself—I can't say, but I notice the date of April 21, so that the secretary who typed that up had to have it in her hands in three days.

Q. So that some time within that three-day period you dictated it and the report was prepared? A. Yes.

Q. Did you read thru the report before signing it, sir? (84) A. Yes, I did.

Q. Now, then, when you examined this patient you asked to make certain movements? A. Yes.

Q. Perform certain functions that you undertook to examine? A. Yes.

Q. And he did that? A. He certainly did.

Q. You evinced no evidence of malingering in the course of that examination?

Mr. Siracuse: I object to the form of the question.

The Court: Sustained. It calls for a conclusion, although the doctor did give some opinion. You could rephrase the question.

Q. Doctor, did he at any time refrain from doing what you asked him in the course of that examination?

A. He did not.

Q. Did you notice any resistance to your efforts to elicit information from this patient? A. No, I did not.

Q. And your report so indicates, in effect, that this is what you found? This is what he did? (85) A. That is right.

Q. Now, then, Doctor, as counsel has asked you in direct examination, you were informed when he came to your office that were certain complaints which were made, injuries of which he was complaining? A. Yes.

Q. And these were furnished to you? A. Yes.

Q. You were informed that he had been at Fordham Hospial? A. Yes.

Q. You were also informed that he had been at Trafalgar Hospital? A. Yes.

Q. Were you advised that X-rays had been taken at these hospitals? A. Yes, I was.

Q. Now, Doctor, in furnishing your evaluation with respect to this patient you obtained the hospital records at Fordham Hospital or Trafalgar Hospital? A. No, I was submitted certain records.

- Q. Could you tell us what records were submitted to you? A. Your office or you did.
- (86) Mr. Chayt: I withdraw the question. Mr. Siracuse: Let him finish. The Court: He is withdrawing the question, and if you want to ask a question on re-direct examination, you may do so.
- Q. Were you told by counsel that they had authorization to examine these records?

Mr. Siracuse: Objection. He has no knowledge. Mr. Chayt: I am asking if he was told by you.

A. No.

Q. Did any representative when he told you to conduct this physical examination and furnish a report, tell you that they had been furnished authorization to examine these hospital records? A. No.

Q. Now, Doctor, you asked representative of our office who came down with Mr. Harel to your office for the purpose of this examination for certain items? A. Right.

Q. Were all of the items which you asked for furnished to you? A. Yes, with the exception of the X-rays.

(87) Q. Now, Doctor, these X-rays you are talking about the only X-rays which were reported to you at that time as having been taken at the two hospitals?

Mr. Siracuse: I object.

The Court: Do you know? If you know.

A. Do I know of any other X-rays? I personally do not know of any X-rays, other X-rays, except the suggestion, mind you, that his own attending physician had taken X-rays.

Q. Who was that attending physician? A. Dr. Zaretsky.

Q. Was it reported to you that these X-rays that Dr. Zaretsky had taken were taken at the Tralfalgar Hospital, where he treated the patient? A. I can't say.

Q. You know of no X-rays, outside the hospital X-rays?

A. As far as the information supplied me, yes.

Q. And, Doctor, before preparing your report and evaluation of this patient, did you ever examine these X-rays to see what they showed? A. I did not.

Q. Just for the record, Doctor, he saw Dr. Horoszowski in Israel after he left the United States (88) follow-

ing your examination of him? A. Yes.

Q. So, obviously, those X-rays did not even exist at the time, the ones we have referred to in the courtroom?

A. That is right.

- Q. Doctor, after you concluded your examination of this patient and furnished the report, when was the next time after the date of April 21, 1975, assuming that is when you signed this letter, that you next had occasion to do anything in connection with this patient and this case? A. 11 a.m. today.
- Q. Now, then, Doctor, when was the first time you ever saw any X-rays in connection with this case? A. An hour ago.

Q. After lunch today? A. Yes.

Q. These X-rays? A. That is right.

Q. So that your evaluation report, we can agree, has nothing to do with these films or these X-rays what Dr. Horoszowski—

Mr. Siracuse: I object.

- (89) The Court: I sustain the objection as to form. If you want to rephrase your question, you may do so.
- Q. Now, Doctor, in your report in describing how far the patient could bend, you did not specify the number of degrees or the inches he could reach toward the floor. A. Yes.

Q. And, Doctor, you used a certain word to describe how far he could bend. A. The word is "completely."

Q. Does that include touching the toes? A. No.

Q. So that the "completely" means a certain thing to you? A. Yes.

Q. Which does not include touching the floor? A. It

certainly does not.

Q. Now, then, doctor, do you conclude on the basis of your examination that this patient had no fracture of

the spine? A. Oh, no, I didn't conclude that.

Q. Doctor, you disagree with the final diagnosis at Fordham Hospital, I understand, in the direct examination? (90) A. Well, I only disagree in the text of the Fordham Hospital. There the correct numbers of the transverse processes are given, and somehow or other when it came to the conclusions and they were not put in as those numbers; they were put in in other numbers.

But the other conclusions were that there was no reference made to a final diagnosis of a fracture of a rib or

ribs.

Q. Well, Doctor, was there not, in fact, different diagnoses with respect to the transverse processes in the record as well? A. No. The number in the record was indicated as 3 and 4 and then in the writing up and the signing out on the chart it is mentioned as 4 and 5. But it is 3 and 4.

Q. You can tell it is a 3 and 4 from what? A. By counting.

Q. Doctor, could you make a circle on a particular X-ray where you see the fractures we are talking about on those X-rays? A. Yes.

Q. Could you circle the two areas that we are talking about? A. I actually should have a marking pencil with me.

(91) Q. As best you can. A. I don't think I ought to put a circle around; I don't know that a radiologist would like me to do that. But I will put a little point like that (marking).

The Court: The doctor has drawn two arrows pointing in the direction of the vertebra.

Q. Now, Doctor,-

Mr. Siracuse: Tranverse processes, if it please your Honor.

Q. Now, Doctor, these portions of the vertebra which are designated as transverse processes, are they on the X-ray film completely detached from the main body? Are there pieces which are completely detached? Is that what I see? A. Yes, you do.

Q. Now, Doctor, would an impact to an individual of such severity to break off the portions of the bone as you see there be of sufficient severity to cause injury to the surrounding soft tissue, the muscle and ligamentous structure? A. Yes.

Q. And, Doctor, would it be fair and reasonable to infer that this person did suffer such injury in that area? (92) A. I think there might have been some modicum of soft tissue injury, injury to the soft parts.

Q. Doctor, your specialty is orthopedics, which deals with bones— A. —and function.

Q. The medical profession does not have the absolute ability to cure? A. No.

Q. Doctor, have you in the course of your own experience found patients without such fracture who have a soft tissue injury to their ligaments and the muscles and those do not show on Y-rays? A. No.

Q. Now, Doctor, to a patient who has sustained trauma to ligaments and muscles with or without a fracture, is it your experience, sir, that a condition such as this is a competent producing cause of pain and disability in various degrees at various times? A. In a general way the answer is yes.

Mr. Siracuse: Your Honor, I will object to the relevancy to the issue at hand.

The Court: I am going to overrule your objection.

Q. Doctor, you told us already what your findings (93) were at the time you performed your examination on Mr. Harel? A. I did.

Q. At the time you performed that examination on Mr. Harel, Mr. Harel had already been through hospitalizations and had been wearing a prescribed back support? He left the hospital with a back support; is that correct? A. I don't know that that is correct, but if you tell me that, I will assume that is so.

The Court: Did he have one when you examined him? The Witness: If I don't mention it, then he did not wear one.

Q. Is that the basis for that statement? A. Yes, it would be, because if he was wearing it, I would say so.

The Court: Do you recall at this point whether or not he was wearing it?

The Witness: I can't recall that, but I know that if he were, in fact, wearing a back support at the time I saw him, then I very definitely would have mentioned it in my report.

Mr. Chayt: I am going to offer at this time also for the purposes of diagnosis, treatment and care the (94) Trafalgar Hospital record.

(Plaintiff's Exhibit 4 marked for identification.)
The Court: Any objection?

Mr. Siracuse: Diagnose, treatment and care? No, sir.

The Court: Received.

(Plaintiff's Exhibit 4 received in evidence.)

Mr. Siracuse: I will concede that the hospital record shows that he was discharged having been given a corset.

The Court: At the moment you are both prepared to stipulate that when discharged from Trafalgar Hospital plaintiff was wearing, was it a corset or a brace?

Mr. Chayt: A back support. . Mr. Siracuse: It was given him.

The Court: Why don't you both look at the record and get your stipulation outside of the hearing of the jury.

(Pause.)

Mr. Siracuse: Your Honor, I am going to withdraw whatever I said earlier about a corset. I see nothing in here. I may have read it someplace else.

(95) The Court: There is no stipulation? Mr. Chayt: I can't find it here.

The Court: In any event, doctor, are you aware of your own knowledge of the plaintiff's having worn a corset or back support at any time?

The Witness: I am not.

The Court: Very well, you may proceed.

Mr. Chayt: Is 4 in evidence?

The Court: On diagnosis, treatment and care.

By Mr. Chayt:

Q. Now, then, doctor, when you performed your examination of the plaintiff you did certain tests? A. Yes.

Q. That you have described? You took a romberg test? And you also checked his eyes for any nystagmus? A. Yes.

Q. Are these orthopedic tests, doctor? A. No. They only come under the heading of a kind of associated orthopedic test. In other words, if you have a patient who has had certain type of injury, a routine examination should include that.

Q. Well, doctor, doesn't it really come under the (96) test of neurological? A. No, it is preservation of function and I think that you will find that orthopedic surgeons when doing a complete examination, especially when enything in the back is concerned, will do those. They are only routine.

Q. And that is true of nystagmus? A. Yes.

Q. What does it have to do with orthopedic? A. You start with the head. Suppose you note that a person has alteration in gait, and—

Q. This patient, however, had no abnormal gait? A. No, he had normal gait, but you notice the sequence. I am not even looking at my report to tell you this, because I know how I make examinations.

Q. What is the sequence? A. The sequence would be in examination of the man exactly as I write it down. So we examine his gait. He walks normally. Then we go

on to his head, his eyes.

- Q. After he walks with a normal gait, you did these tests on him then? A. Because, if you know, if I may, if you look at my examination, it is the way I have been doing it for 39 years. It is that I look at the patient. I then have him walk, and then I start at the top of his head and I go (97) to those parts that I have been told were affected.
- Q. Doctor, is this the same way you examine your own patients that you are treating? A. If I am thorough, yes.

Q. If you are thorough? A. Yes.

Q. Then doctor, you do treat patients in addition to

doing these examinations? A. Oh, yes.

Q. And, doctor, when you examined this patient with respect to his neck, for example, you found nothing? A. That is right.

Q. No abnormality? A. That is right.

Q. Well, doctor, apart from his having had a back support, which you had no knowledge, are you aware

that he had a tracheotomy done as a child, which left a scar on his throat? A. Yes.

Q. Where does it appear in your report? A. It does

not appear in my report.

Q. Now, doctor, did you examine before you came to court today the hospital records with regard to that condition? (98) A. No, I don't think so. That was not supplied to me.

Q. But you did perform a thorough examination on this

patient? A. Right.

Q. Now, doctor, I call your attention to a page numbered 10 now—

Mr. Siracuse: Was that question about the Fordham Hospital?

Q. Page 10, the Fordham Hospital. Do you have that?

Mr. Siracuse: With your Honor's permission, the question to the doctor before was whether he read it at the time of his examination.

Mr. Chayt: I am asking whether he saw the

Fordham Hospital record.

Mr. Siracuse: At what time.

Mr. Chayt: At that time.

The Witness: The answer is no, I didn't see it.

Q. Doctor, I call your attention to the trauma resident's admission note— A. You said page 10.

Q. It starts on page 9 and continues on the (99) next

page. A. All right?

Q. The trauma resident's admissibility note. Now, the resident is a doctor who is in training? A. Yes.

Q. In fact, you describe going through a period of several residencies in the normal course of arriving at the position you now have? A. Yes.

Q. And a resident examined this patient, according to

the record! A. Yes.

Q. With respect to the neck, what does he say, doctor, second line on page marked 10 on that record? A. No nuchal rigidity, meaning no neck rigidity. Scar of previous tracheotomy.

Q. So that, doctor, would you say that the scar could have been visible to that resident at that time but not visible when you examined him in April? A. No, but not

noted by me.

Q. Doctor, when you examined the patient with respect to the left foot, about which complaint was made, did you find any objective sign of injury? A. Objective? No. (100) Q. And, doctor, do you say because of that that this patient sustained no injury to his left foot? A. I didn't say that.

Q. I am asking you that. A. I didn't say that.

Q. So, doctor, do you say because of the fact that you saw nothing on the day you examined him in April 1975 that he suffered no injury to the left foot?

Mr. Siracuse: I object to the form of the question.

The Court: Sustained. Rephrase it, please.

Q. Doctor, can you tell this jury whether or not this man sustained an injury to his left foot in this accident? A. No.

Q. Doctor, I call your attention to a page I have marked as 20, an X-ray report.

Mr. Siracuse: What hospital? The Court: Exhibit 3.

Q. That is the X-ray dated 12-27-74. Do you have that, doctor, before you? A. Yes.

Q. Left ankle study shows soft tissue swelling at the level of the lateral malleolus. (101) A. Yes.

Q. Where is that, doctor? A. The bone sticking out on the side of the side of your ankle.

Q. That is the protuberance on the side of your ankle as we touch it?

The Court: I believe counsel said 12-27-74; it would appear to the Court that the date 12-26-74. 12-24-74 is the date of the accident.

Mr. Chayt: Yes, thank you, your Honor.

By Mr. Chayt:

Q. Page 20 shows that the X-ray was taken on the 24th and dictated on the 27th and transcribed on the 30th.

There is calcification in the soft tissues which could represent a chip fracture.

Mr. Siracuse: I object to this. This is highly improper. I respectfully suggest, sir.

Mr. Chayt: I am reading what is in the record.

Mr. Siracuse: I object.

The Court: This first question is this, if this is part of what has been received in evidence under diagnosis, treatment and cure. I suggest if it is in (102) evidence it can be read and you can argue from it. If you are arguing to me, counsel, that is not what has been received in evidence, I will hear you further.

Mr. Siracuse: Yes, I would respectfully ask that I be heard further.

The Court: What you are saying, what has been read in the diagnosis, treatment are not.

Mr. Siracuse: That is my point. It could not be diagnosis. These are working theories that the doctor might have, but these are not diagnosis, and, therefore, that is why I make the objection.

Mr. Chayt: I don't agree with counsel's interpretation. I say it is part of the record for explanation.

The Court: But the problem is this, that we have received without objection the hospital record and

so far as it covered diagnosis, treatment and cure, and the query I asked of both of you is whether what we are talking about is within those three categories.

Mr. Chayt: My argument is that it is relevant.

The Court: It may be relevant, but if it was not admitted, I can't have you read it.

Mr. Chayt: I am not quarreling with counsel. I never said the ultimate diagnosis was a hip fracture. (103) I am reading it for another injury, to ask if there was any evidence of injury.

The Court: Just phrase a question in your own language without reading in hoc verba, and then we will have the doctor respond. I will give you latitude on cross examination.

Mr. Chayt: The only problem I have with that, this is going to be dealt with on summation, and if I don't get it in—

The Court: But it is not in evidence and I can't let you read it.

Mr. Chayt: I don't know what parts are in evidence.

Mr. Siracuse: Whatever is conjecture is not in evidence.

The Court: I think you can phrase a good question.

Q. And, doctor, where the report says study shows soft tissue swelling at the level of the lateral malleolus, is that conjecture, doctor? A. No.

Q. Now, doctor, is that objective evidence that this man had an injury to that area? A. Not necessarily, it doesn't mean that he had. (104) I am not trying to split hairs on the situation. In other words, if he had direct injury to the ankle and then the soft tissue is reported on, then it would be due to an injury, if you follow me.

Q. Only if he had injury at the ankle? A. That is right.

Mr. Siracuse: May I interrupt? This doctor examined this patient some several or so months after this hospital observation, and, of certainty swelling is not going to be present at the time he is examining, and I don't see the relevancy of this.

Mr. Chayt: His findings are not necessarily determinative, sir. The doctor said he would have

muscle injury.

The Court: I thought he said that, and then he said he examined the patient some five months after the accident, and we all know that if you sustain something in the form of a trauma that renders you black and blue, the chances are that you will not remain black and blue for five months. I would suggest you have the right to argue that your client at the time of the incident received certain additional injuries, and your adversary will argue, "Fine, he may well have done so, but they were all better by the time the doctor saw him five months later."

(105) Each of you is entitled to make your respective arguments.

Mr. Siracuse: Thank you, sir

By Mr. Chayt:

Q. Now, doctor, at the time you examined Mr. Harel in April, 1975, at that time was he still complaining of any difficulty with this foot? A. Actually he was not complaining about the ankle at all, just my examination of him I found that there was tenderness there.

Q. Now, then, doctor, he was, however, at the time you examined him still complaining of certain of these conditions, these injuries? A. Yes, but he was not complain-

ing about his ankle.

Q. What were the areas about which he was complaining?

Mr. Siracuse: May I respectfully suggest this is an improper question. I would object.

The Court: No, I think it is within the bounds of cross examination, and that is what we are on now.

A. Occasional pain, intermittent headaches, dizziness, pain in the area of the fractures, pain in the (106) back with limitation of motion, frequent spasm, pain in the area of the chest cage, rib cage.

Q. Now, doctor, from the information you have before you today, as well as what information you had or took at the time of your examination of Mr. Harel, do you dispute that Mr. Harel had a fracture of a left rib, whichever number it was? A. I can't dispute it, but I can't say that it has ever been definitely made in a hospital record. It is never definitely made.

Q. Doctor, I call your attention to page 8 of the Fordham record.

The Court: Exhibit 3 in evidence, the doctor is now looking at.

Q. I call your attention to "X-rays reveal cortical fracture of left 6th rib." A. Yes.

Q. Now, sir, may we know who said that? Was that a radiologist? A. It is one of the house staff, I think.

The Court: This is an exhibit which does not appear to be a particularly legible.

Mr. Siracuse: May we have the second part of that read? What else did he say?

(107) Q. X-rays reveal cortical fracture of left 6th rib, fracture of transverse process of 3rd lumbar vertebra? A. Yes.

Q. You are in disagreement with the second one? A. That is right.

Q. But with the first one you have no basis of agreeing or disagreeing? A. No, I did not say that. You ask of me whether I would disagree with the diagnosis of a fracture of the rib and—

> Mr. Siracuse: There was no diagnosis of fracture of the rib.

> The Court: Yes, I think that objection properly lies from what I have listened to in the last few moments. Why don't you rephrase your question, working from the report itself? That portion to which you just made reference in evidence and you can read it or paraphrase it.

Mr. Chayt: I am not sure I completely the Court

on that.

By Mr. Chayt:

Q. Are you denying that this patient had a fracture of the rib?

Mr. Siracuse: I object to the form of the (108) question.

The Court: Yes, you should not phrase it, "are you denying." The phraseology could be improved and it could be a proper question.

Q. Now, doctor, with respect to page 27 of the Ford-ham record, Exhibit 3, the entry that appears there, when the patient is referred for physiotherapy. He has sustained a fracture of the left transverse processes of L3 and L4, also fracture of the 7th rib on the left? A. Yes. I don't see that number, but I am just going along with what you said.

Mr. Siracuse: That is not even a doctor's note. That is physiotherapist's.

The Witness: On what page?

The Court: Unless there was a predicate to the question indicating that it was a doctor's note, I think it could still be asked. Why don't we have the doctor, who is now thumbing through the medical record, locate the page.

The Witness: I see it.

Mr. Siracuse: May I interrupt? Does RPT mean something?

The Court: Yes, Registered Physical Therapist.

(109) Please, counsel, you have no standing to ask questions at this time. We are on cross examination.

Mr. Siracuse: I asked permission. I thought your Honor granted it.

The Court: No, I did not. Mr. Siracuse: I am sorry.

By Mr. Chayt:

Q. Now, doctor, while we are on the lettering here, when they say NPO in the record, what does that mean? A. Nothing by mouth.

Q. In other words, he is not to take anything by mouth

during that time? A. Yes.

Q. And when they say IV, what does that mean? A. Intravenous.

Q. Do you know whether this patient had intravenous administered at the hospital?

The Court: Does he know or does the record show it?

Q. At this time, doctor, as you read the report, can you tell us on your review of the record whether or not this patient ever had intraveuous feeding at this hospital? A. Well, I don't know if you want to use the word (110) feeding, but he had intravenous. It is on the order sheet here.

Q. And when did you become aware of that for the

first time? A. Half a minute ago.

Q. Doctor, I call your attention to page 18, Current Consultation Record, signed with initials that look like RAP, January 2, 1975, and the consultant's opinion: 27 year old hit by auto 12-24-74 with fracture left 7th rib, fracture transverse processes L3 and L4 has been complaining of pain on deep breathing left chest and pain low thoracic spine. Examination tender T9-10, SLR and bilaterally.

What does SLR mean? A. Straight leg raising.

Q. That was a test you performed? A. Yes.

Q. And he says at the time he performed this test in January he found positive results? A. Yes. In the first place, what was the date of that?

Q. I see January 2. A. Yes.

Q. Now, doctor, if that test were performed on (111) September 17, 1975 the straight leg raising test, and there was positive findings, then would you say that that could still be consistent with your own examination of this patient? A. Not exactly.

Q. In other words, it might be consistent, but in your opinion it is more likely that you differ with respect to the doctor who says he found that finding of positive

results? A. That is right.

Mr. Siracuse: May we know what you are referring to?

Mr. Chayt: In the questioning of Dr. Horoszow-

ski.

Q. Did you do a physical examination of the plaintiff?

A. Yes, certainly.

Q. This is September 17—I am looking to see—yes, September 17, 1975. You examined him in April of that year.

21: "If your answer to the previous question was ves. what were your findings on this examination? A. I found that when standing the patient had a scoliosis of the lumbar region to the left 20 degrees, (112) predominant on the lumbar part of the spine. A scoliosis is an abnormal rotation and shift or deviation from the midline of the spinal vertebrae. There was marked spasm of the paravertebral muscles which I observed to be greater on the right side of the spine and greatest in the lumbar part of the spinal column. Such spasm was observable by me by touching the patient. This is objective and observable by the trained physician. I found motion of his spine to be very limited. Flexion was possible only to 30 degrees. Extension was restricted to zero. I observed that the patient then had to bend the knees and there was augmentation or increase of observable paravertebral 'Paravertebral' refers to the muscles on both sides of the spinal column. Lateral bending, which is from side to tide, was possible to 30 degrees on the left and only 20 degrees on the right. Rotational movements of the spinal column were observed to be painful to the patient. The patient was then made to lie down and the Lasegue test was given on both sides. This test consists of straight leg raising while the patient is on his back, one leg at a time. The straight leg raising could be performed up to 40 degrees on the left side and 60 degrees on the right side. There are no other pathological findings. Both legs were normally symetrical with no length discrepancy. (113) There were no objective neurological signs, and the reflexes, sensibility and muscle strength of the legs were normal. I found no objective evidence of injury at the time of my examination of either the left ankle or the chest."

Now, Doctor, would you say that these findings are necessarily consistent with the findings you made of the patient when you examined him in April? In other words,

could the same patient perform in accordance with your examination of him in April and in the same way as this doctor described in September of that year? A. Are you asking me is it possible?

Q. Yes, could that be or is that inconsistent? A. You can't say it is inconsistent. But if you are asking me if it is possible, it is possible. There is a big difference.

Q. The reason for that condition that the patient suffered, at least, in the lumbar spine, is such that it could flare up and recur, depending on what the patient is doing at various times? A. That is within the realm of possibility.

Q. In fact, doctor, would it not be fair to say that having had this fracture, that this fracture is going to be permanent, he is going to live with it for the rest of his life? (114) A. The transverse processes—

Mr. Siracuse: I object to the form of the question.

The Court: Sustained.

Q. Doctor, will these fractures of the transverse processes ever come back together like Humpty Dumpty?

Mr. Siracuse: Objection. The Court: Sustained.

- Q. Will they ever go back together again in the absence of surgery? A. No.
 - Q. Do you recommend surgery? A. No.
- Q. Doctor, would this type of injury be a competent producing cause of pain? A. Could?
 - Q. Could it? A. Yes.
- Q. And doctor, when you answered counsel with respect to the hypothetical question that he put to you about this man working on the job, a job that occasioned his bending and crawling into tight spaces and lifting heavy objects, doctor, do you know how he experiences or what he felt like when he was doing that? (115) A. How can I say how he felt. I can only tell you what was told me.

Q. And yet, doctor, what was told you? A. That he did the work of an airplane mechanic.

Q. Doctor, do you know how he felt when he performed this work? A. How would I know?

Q. Doctor, you rendered an opinion-

The Court: Sustained. The jury will disregard counsel's comments.

Q. Now, doctor, to your knowledge from an examination of this record did this patient sustain any head injury? A. I don't see it in the record. I did not see it in the hospital record.

Q. Well, doctor, do you know whether this patient had headaches continually while he was in the hospital? A. I can't say that. I don't know that.

Q. You don't know whether he did or didn't? A. No.

Q. Doctor, is there any diagnosis in this hospital record on the final diagnosis or anywhere in the record which would account for complaints for continuing headaches (116) of this patient? A. I see no diagnosis to the effect.

Mr. Siracuse: I am going to object to the form

of that question.

The Court: Well, the answer is clear and the question with a negative answer like that is no evidence. I will indicate to the jury, the evidence is in the answers, and not in the questions, unless the witness agrees with the question or gives some affirmative response.

Q. Then, doctor, I call your attention to the nurses' notes. A. Yes.

Q. That is marked as page 45. Down near the bottom. A. Yes.

Q. Complaining of headaches at times, blood pressure, and then otherwise general condition fair. A. Yes.

Q. Made as comfortable as possible? A. Yes.

Q. So that on December 27 we have complaints to the nurses at times of headaches? A. Yes.

Q. Now, doctor, December 24 is the date the (117) patient came into the hospital, and we have the very first nur e's note, headache? A. Where do you see that?

Q. Third line from the bottom on page 42, the very first nurse's note. A. Complaining of headache.

Q. So that the patient on December 24, 1974 was complaining in the hospital, to the nurses at least, of headache? A. Yes.

Q. Page 47, the third entry, there is something and then on 1-1-75, OOB; is that out of bed? A. Yes.

Q. Complains of slight headache, walks with a lean toward the right side.

Is that correct, doctor? A. I think that word is lean, or it may be head.

Q. Would be head toward the right side? A. Maybe it is lean. I don't know what that is. I think that is head towards right side, comfortable.

Q. January 2, complained of pain; medicated with Darvon; is that right? A. Yes.

(118) Q. Darvon is a pain killer? A. Yes.

Q. Now, doctor, would headaches repeatedly following an accident such as this, where the patient has no recollection of the circumstances of his arrival at the hospital, would that be consistent with a diagnosis of concussion?

Mr. Siracuse: I object to the form of the question.

Q. Do you have an opinion with a reasonable degree of certainty as to whether this man, who was in good health up to the time of this accident and who reports that he has no recollection from the time of the accident of how he arrived at the hospital until he arrived at the hospital, how he got there, and then he has headaches following the time that he came into the hospital, do you have an opinion with reasonable certainty as to whether a diagnosis of concussion would be consistent with this?

A. It is not consistent with what you say, no.

Q. Well, doctor, is there any diagnosis in this hospital record that is consistent with that? A. I don't know what you mean.

Q. Is there any diagnosis?

Mr. Siracuse: I object to the form of the (119) question.

Q. Will you look through the exhibit?

The Court: It has been answered. Now there is going to be another question.

Q. Will you look through this exhibit 3 and tell me, doctor, what diagnosis has been made by any physician at Fordham Hospital which would give a basis for the headaches of which this patient was complaining? A. There is none.

Q. Now, doctor, you received a fee or will receive a fee for coming to court? A. Yes.

Q. What is your fee? A. If it continues much longer-

Q. You are almost finished. A. It better be almost. Some place between \$500 and \$700.

Q. Doctor, is this your customary fee for an appearance in court? A. Yes.

Q. And, doctor, how often do you perform examinations for the office that represents Mr. Diamond in this case?

Mr. Siracuse: My office?

The Court: No, the office that originally (120) represented him, that requested the doctor to perform the examination.

By Mr. Chayt:

Q. I want to be sure. DeSantis, McGarry, Totora, and Hargis. A. I would say frequently, if that is the name, because that name is the name I think I know of.

Q. And, doctor, would it be fair to say that these are not the only attorneys for whom you have occasion to perform physical examinations in connection with litigation? A. That is right.

Q. How many other attorneys do you do this for? A.

I can't say.

Q. Suppose you try. A. Well, it depends. Are you speaking from a defendant's point of view or are you speaking from a plaintiff's point of view, because my examinations may be both for a plaintiff and a defendant.

Q. I appreciate that, doctor. Thank you.

How much litigation do you have occasion to do? A. I don't know what you mean.

The Court: He is doctor; stick to his (121) profession.

Q. Doctor, medically how much litigation are you connected with? How frequently do you perform examinations in connection with litigation? A. Frequently.

Q. Well, doctor what is frequently to me may not be to you. A. I think frequently is frequently to you and frequently to me.

The Court: Doctor, how many examinations do you conduct on an average each month in connection with matters which are in litigation?

The Witness: Both for plaintiff and defendant?

The Court: I don't care for who.

The Witness: I would say probably about 40 or 50.

The Court: Per month?

The Witness: I think so, on both sides of the fence, yes.

The Court: Would that work out to an average of some 500 to 600 a year?

The Witness: No, that sounds too much.

The Court: Well, I merely multiplied your figure. Give us an annual estimate of the examinations (122) are conducted in connection with matters in litigation.

The Witness: 500 to 600 seems an awful lot to me; I would say someplace of the vicinity of at least 200, 250 all around, but I think the 500 and 600 number seems too much to me.

By Mr. Chayt:

Q. Do you have any personal recollection of having examined Mr. Harel? A. Yes, I do.

Q. You do? A. Yes, I do.

Mr. Chayt: That is all.

Re-direct Examination by Mr. Siracuse:

Q. You are also appointed impartial examiner by the courts and federal agencies? A. One court and several federal agencies.

Q. I hope I can ask you just this question—I know it is late—Doctor, do you remember you were asked about what was found by Dr. Horoszowski with respect to, "I found that when standing the patient had a scoliosis of the lumbar region to the left 20 degrees predominantly on the lumbar part of the spine."

Do you see any scoliosis on the lumbar region (123)

in the X-rays? A. No.

Q. As a matter of fact you did see a scoliosis as you told us about that, and that was in the dorsal region?

A. Yes.

Q. And you told us, as far as you were concerned, that it predated the date of the accident? A. Yes, it was old.

Q. It was old? A. That is right.

Q. Then you were told that "motion of the spine was very limited, that flexion was possible only to 30 degrees, that extension was restricted to zero, that there was augmentation or increase or observable paravertebral spasm."

Dr. Samuel S. Cohen, for Defendant, Re-cross

Now, that was read to you, that Dr. Horoszowski talked about the limitation of motion.

Doctor, a man with that kind of limitation of motion and working at a job that required the work of an aircraft mechanic, to crawl into tight spaces and work bent over and sometimes to lift heavy equipment, drive an armored vehicle, could he do that consistent with his having limitation of motion? Could he do that work?

(124) The Court: How many questions do you want him to answer? Let us start over again.

Mr. Siracuse: The reason I have done this, I am trying to rush, to get out of here by five o'clock. I know I am keeping everybody. I agree with you on that.

Q. Considering all those, could be have operated under those circumstances? A. Not from that description, no.

Mr. Siracuse: Thank you. I have no further questions.

Re-cross Examination by Mr. Chayt:

Q. You say this is an old condition in the upper thoracic spine? A. Yes.

Q. Do you have any history of any complaints with respect to upper spine prior to this accident? A. No.

Q. Any indication of any trouble or difficulty that he ever had? A. No.

Q. In fact, when he came to you, doctor, did he complain to you at that physical examination of pain in this region at that time? (125) A. No.

Q. Are you aware whether or not he was being treated with respect to this region at Fordham Hospital? A. He never was.

Q. I show you page 26? A. Yes.

Q. Of Exhibit 3? A. Yes.

Dr. Samuel S. Cohen, for Defendant, Re-cross

Q. The rehabilitation note: Patient seen again this date for hot packs to the thoracic spine and left chest?

A. Yes.

Q. Now, doctor, are you disputing that they administered hot packs to the thoracic spine? A. I am not here to dispute it or dispute anything.

Q. I am asking you if you are disagreeing with that?

A. I don't disagree wth that.

Q. You accept that? A. Yes.

Q. Doctor, will you tell us what diagnosis there is in the Fordham Hospital record with respect to the thoracic spine, the upper part of the back that we are (126) talking about. A. There is none.

Q. For which they administered hot packs at the hospital? A. The hot packs were administered for his ribs, and the ribs—

Q. Just one moment-

The Court: Why don't you let him finish, counsel. You want to know why the hot packs were administered. He is answering.

A. (Continuing) and the ribs originate in the back and run around the chest wall. So when a hot pack is given, it is given for the area that was hurt, and the area that was hurt is the thoracic region. They gave him a hot pack for that part of his back and for the ribs and it is all part and parcel of the same thing.

Q. Is there any evidence that the hospital examined by X-ray that portion of the thoracic spine to observe whether or not there was an injury originating in the thoracic spine rather than in the left rib? A. No, there

is no indication of that.

Q. But, doctor, at the same time, they put hot packs on his back, the thoracic spine, and they also put hot packs on his left chest? (127) A. This is just the description of a therapist. A therapist may say chest. She may put

Dr. Samuel S. Cohen, for Defendant, Re-direct

it on the back and then turn him over and then say thoracic. You can't make any sort of diagnosis out of that.

Q. Doctor, you say that there is no way of diagnosing that he had a fracture of the rib, either for that matter? A. No, I said that in no place is there a conclusive final diagnosis of the rib.

Mr. Chayt: I have no further questions. Mr. Siracuse: I have a few questions.

The Court: We will have to have the doctor come back on Monday. I don't want to cut you off. The doctor wil return Monday at 9:30. You stand up and then the other stands.

Mr. Siracuse: I will not ask the question.

The Court: I am not going to cut you off. The doctor will come back Monday.

Mr. Siracuse: This gentleman came today at my request and he has many patients to treat.

The Court: If you want to finish, go ahead.

Mr. Siracuse: I have nothing further.

The Court: No, it may be somethting very important. Go ahead.

(128) Re-direct Examination by Mr. Siracuse:

Q. Did you find any fractures other than the transverse fracture of 3 and 4? A. No, I didn't.

Q. Did you find any fracture of T4 or 5? A. No.

Mr. Siracuse: Thank you, doctor.

Mr. Chayt: No examination, doctor.

The Court: You are excused.

The Witness: Thank you very much.

(Witness excused.)

Colloquy

(131) The Court: Good morning, ladies and gentlemen. We are going to resume the trial now. You recall that we took the defendant's doctor out of turn, but if you recall, we are still on the plaintiff's case. Therefore, I will turn to Mr. Chayt and ask him to please proceed.

Mr. Chayt: Yes, your Honor. Thank you very

much for the opportunity.

At this point, your Honor, I offer the deposition of my client, Mr. Ytzhak Harel, and I do so on the basis that Mr. Harel presently is in Israel and that his testimony was taken on his behalf specifically for the purpose that in the event we were unable to appear for trial it might be used under the rules of the court. I offer this envelope just received, from a letter from Mr. Harel confirming his present location there.

Mr. Siracuse: If counsel states that the witness is in Israel, then I have no objection, your Honor,

based on that aspect.

The Court: Very well. You represent that your client is in Israel at the present time; is that correct, sir?

Mr. Chayt: Yes, your Honor. And that it would have taken two weeks, as the Court is aware from the pretrial (132) order, to produce him in the event of trial, and we were unable to work that out with the Court because the Court is under severe time circumstances.

Mr. Siracuse: Your Honor, I respectfully object to those remarks.

The Court: Yes, we will disregard those. It has been agreed that you represent that the plaintiff is absent from the jurisdiction which would within reasonable limitations permit the use of dis deposition taken upon written interrogatories. Of course,

Colloquy

by my permitting this to occur, I have not indicated in any way that I will not sustain objections to appropriate questions or direct that certain answers be stricken, for example, if they are not responsive.

Mr. Siracuse: Thank you, sir. The Court: You may proceed.

Mr. Chayt: With the Court's indulgence, I'd like to have my assistant, Mr. Bernard Shapiro, take the stand to answer the questions that I'm going to ask as if Mr. Harel was answering.

The Court: Yes. The document in question was filed with the Court on March 19, 1976 and therefore is part of the record in this case.

Ladies and gentlemen, as you will undoubtedly (133) ascertain from the colloquy that just went on between Court and counsel, the plaintiff is not here. However, there are rules which permit his testimony to be taken either orally or by his submitting answers to certain questions overseas, and the latter course, as I understand it, was followed here. At this point, plaintiff's counsel will read certain questions which were put to the plaintiff under oath, overseas. And then his colleague will read the answers. And it will be just like any other examination, because the defendant's attorney will have the right first to present any questions he may have had—did you have any cross examination?

Mr. Chayt: There was no cross of this witness, your Hor "; only of Dr. Horoszowski.

The Court: Defendant's counsel will have the right to interpose objections, just as if a live witness were on the stand.

Mr. Chayt: "Hereinafter are the questions put to me by Dan Ben Bassat and my answers to these questions.

"Q. What is your name and home address? A. My name is Ytzhak Harel and I presently live at 38 Katzenelson Street, Givataim, Israel.

"Q. Where were you born? A. Israel.

"Q. Have you been married? (134) A. No.

"Q. On December 24, 1974, where were you staying? A. At 232 East 40th Street, New York.

"Q. If you were staying with someone at that address, who was that? A. It was a friend's apartment, but I stayed there alone.

"Q. When before that date had you come to the United States? A. I came to the United States on June 26, 1974.

"Q. Just before you came to the United States, what was your occupation? A. I had been in the Israeli Army.

"Q. How long had you had that occupation? A. I was in the Army for three years.

"Q. Before that, what did you do? A. I had been a student.

"Q. What was your legal status while you were in the United States? A. I was a tourist.

"Q. When where you due to return home? A. January 25, 1975. That was the date my visa expired.

(135) "Q. On December 24, 1974, were you involved in an accident? A. Yes.

"Q. How did you feel physically and emotionally earlier that day? A. I felt fine.

"Q. What time of day was that accident? A. About 8 A.M.

"Q. Where were you coming from at that time? A. From 232 East 40th Street through Jerome Avenue subway to Fordham Road Station.

"Q. What was the weather like? A. Fine.

"Q. Were you with anyone? A. No.

"Q. What were you doing at the time of the accident?

A. I was walking along the sidewalk.

"Q. On what part of the street were you at the time the accident happened? A. I was on a sidewalk.

"Q. Where were you in relation to the nearest intersecting street? A. There were streets all around the sidewalk.

(136) "Q. Do you know the compass direction you were facing just before the accident happened? A. East.

"Q. Did you see anything coming toward you at any time before the accident? A. I do not remember anything coming toward me.

"Q. What is the next taing you remember happening? A. I remember that I was walking on the sidewalk and then I remember being in an ambulance. I don't remember what happened in between.

"Q. Where were you at that time? A. I was on the way to the Fordham Hospital.

"Q. Describe as fully as you can how you felt at that time?"

Mr. Siracuse: Objection, if you please, your Honor how he felt as far as the first sentence is concerned.

The Court: You have an objection to the first sentence only, is that right?

Mr. Siracuse: That's right, your Honor.

The Court: Sustained. Would you read the second sentence, please.

(137) By Mr. Chayt:

"A. I felt pain in my head and over different parts of my body and in my left chest and the left ankle."

Mr. Chayt: Your Honor, I take it exceptions are automatic. I don't have to state them each time?

The Court: You'd better state the reason for your objection because I don't think an exception would

properly lie.

Mr. Chayt: He was stating his emotional state which is as relevant as his physical condition with respect to the injury on his person. He is not stating hearsay. He is stating in the first instance how this affected him mentally as well as how it affected him physically.

Mr. Siracuse: Your Honor, hasn't he more or less-

The Court: I thought you indicated to the jury originally that your claim was pain and suffering. Are you claiming some sort of mental condition here? I don't think that is really part of your case and therefore I think there is a question of relevance.

Mr. Chayt: I am claiming the normal mental consequences of anxiety that follow a trauma. Not an abnormal, that the man became psychotic, but the effects on a person (138) of being in this condition.

The Court: The jury can draw their own conclusions of what happens when you are walking on the sidewalk, and the next minute you wake up in an ambulance. Sustained.

By Mr. Chayt:

"Q. How long were you at Fordham Hospital? A. I was there from December 24th until January 8, 1975.

"Q. Describe the room or rooms you were in while at Fordham Hospital?"

Mr. Siracuse: If your Honor please, would you read that answer. I object to it.

Mr. Chayt: May I say that the circumstances of his care, your Honor, without going into the substance of it—

The Court: Please. Overruled.

"A. The first room was a big room with forty beds, all full with new patients—very noisy—no privacy and no rest. About four days before I left, I was transferred to a smaller room, twenty beds, which was a little better.

"Q. What do you recall of what was done to you while you were there? A. I remember they took X-Rays. For over two (139) days they didn't feed me except liquid through a tube in my arm and they measured the liquid output. Then I was given only juice the next day, although by then I was very hungry. The first few days I was not given medicine for my pain and even afterward I had difficulty getting medicine strong enough so I could sleep through the night. I had a tube in my nose, another tube into my arm and a tube in my penis. I was kept in bed at first, not even allowing me up to use a toilet. My leg was strapped and they sometimes changed my position because I couldn't do it myself. They applied something hot and wet to my left ribs.

"Q. How did you feel while you were at that hospital?

A. When I first realized I was at a hospital, I was very frightened. I was in pain. They put tubes in me and I didn't know what these were or even how badly I was

hurt."

Mr. Siracuse: May I interrupt, your Honor. Part of that I think is objectionable. Do you want me to give you the specifics sir?

The Court: No. But I suggest the jury has heard it and really there is no sense in my going back over it. You were able to read ahead, sir, and you should have stood (140) up earlier.

Mr. Siracuse: I have no objection to that part that has been read, sir. I am objecting to the last two sentences, I think.

The Court: All right. Let me go down to that. (Pause.)

The Court: Yes, I'm going to sustain an objection. You may read up through the words "I was very uncomfortable."

Mr. Chayt: I respectfully except. Would vou continue.

"A. I remember that my head hurt me, my back hurt, I felt pain in my chest that I couldn't take a deep breath. Also, my left ankle was swollen and my left foot and leg hurt when I moved. I was in a large room with a lot of patients and although I wanted to rest, between the noise of the other patients and the nurses checking me day and night, I was very uncomfortable.

"Q. Where did you go from there? A. To Trafalgar Hospital.

"Q. How did you leave Fordham Hospital? A. An ambulance came for me and the attendants helped me into the ambulance and out again at Trafalgar.

(141) "Q. How long were you at Trafalgar Hospital? A. I was there from January 8 to January 14, 1975.

"Q. Describe the room or rooms you were in while at Trafalgar Hospital? A. There I shared a room with only two other patients.

"Q. What do you recall of what was done to you while you were there? A. At first, I was restricted to bed and I was placed on a hard bed. I was given medicine and made to rest until they ordered a special back support for me which I wore when I left the hospital. They also took X-Rays once.

"Q. Do you recall the name of a doctor treating you at Trafalgar Hospital? A. Yes, I recall one.

"Q. If you do recall, what was the name of a doctor treating you there? A. Dr. Zaretsky.

"Q. Did you see that doctor again after you left the

hospital? A. Yes.

"Q. If you did, where was it that you saw him?"

(142) Mr. Chayt: If your Honor please, may I interject at this point something to clarify to the jury. The question, "If you did," is because these questions were submitted in advance and we were not aware of the answers to these questions at the time they were asked. So that is why I ask; it seems pointless perhaps at this time when the jury hears it, but I thought I should explain it.

Mr. Siracuse: Your Honor, I object to this.

The Court: Yes, I don't think it is necessary to editorialize. But at the same time I will instruct the jury that what counsel has just said is accurate. When you prepare a set of questions and send them overseas you don't always anticipate every answer and therefore the questions are sometimes a bit open-ended. In any event, let's get on with it.

By Mr. Chayt:

"Q. Did you see that doctor again after you left the hospital? A. Yes.

"Q. If you did, where was it that you saw him? A.

At his office in Manhattan.

"Q. When you left the hospital, did you leave unassisted? A. I was able to walk out wearing the back (143) support.

"Q. Were you at that time wearing any support or device? A. Yes, I was wearing the back support.

"Q. Prior to the accident, had you ever worn a support or device? A. No.

"Q. Prior to the accident, had you ever had any pain in your chest? A. No.

"Q. Prior to the accident, had you ever had back pain?

A. No.

"Q. Prior to the accident, had you ever had any headaches? A. Maybe. None that I remember and certainly nothing like I had at Fordham Hospital.

"Q. Prior to the accident, had you ever had any pain

or difficulty with your left foot? A. No."

Mr. Siracuse: If your Honor please, may I respectfully suggest that the only part of that which is responsive would probably be the last phrase starting with the word on the last line.

(144) The Court: Yes. Responsive to the question are the first few words after the dash. Because the question is, "Where did you go from Trafalgar Hospital?"

By Mr. Chayt:

"A. I went to the YMHA at East 92nd Street.

"Q. How do you feel at this time? A. When I left Trafalgar Hospital I was dizzy and even had trouble and fear crossing the street."

Mr. Siracuse: If your Honor please, there is no claim for this and therefore I respectfully suggest this is irrelevant.

The Court: Well, there is something else, I suppose. It's really not responsive. It's "How do you feel at this time." And then the answer that follows does not appear responsive. Is that your objection?

Mr. Siracuse: That is my objection.

The Court: Sustained.

Mr. Chayt: If your Honor please, might I ask that the last portion of the answer starting with "I had," be read to the jury as responsive.

The Court: No, because it doesn't relate to how he felt, you see.

Mr. Chayt: I see. All right.

The Court: Sustained.

(145) By Mr. Chayt:

"Q. If, after you left Trafalgar Hospital, you you saw any doctor or doctors other than those you had seen at Fordham and Trafalgar Hospitals, identify such doctor or doctors? A. There was Dr. Budabin in Manhattan who I saw twice and Dr. Horozowski who I saw here in Israel.

"Q. —

Mr. Siracuse: I object, if your Honor please. After Dr. Horozowski.

The Court: "Who I saw here in Israel." I will sustain an objection to the rest as not responsive because the question directs identifying doctors. He saw Dr. Budabin in Manhattan and Dr. Horozowski in Israel. Next question.

Mr. Chayt: Yes, your Honor.

"Q. If you did see such doctor or doctors after you left the hospital, tell us as best you recall when it was that you saw them and where?"

Mr. Siracuse: Objection, your Honor, at least to a portion of that. I would suggest that I am objecting to the last sentence, sir.

The Court: Yes.

Mr. Chayt: If your Honor please-

The Court: Wait a minute. Now let me read it.

(146) (Pause.)

The Court: I will sustain an objection to the last sentence. Would you read when he saw the doctors, which is what the question is all about.

"A. I saw Dr. Budabin once in March 1975 and again in April 1975. I saw Dr. Horozowski in September 1975 and October 1975.

"Q. Did there come a time when you left the United States? A. Yes.

"Q. While you were there after the accident, how did you occupy yourself? A. After I came out of the hospital, I rested and continued to see Dr. Zaretsky, following his advice, until I left the country.

"Q. Were your activities affected by your physical condition during this time? A. Yes.

"Q. Describe what, if anything, was bothering you while you were still in that country and in what way, if any, your activities were affected?"

Mr. Siracuse: Your Honor, may I object to the last sentence, sir?

Mr. Chayt: If it please your Honor, that (147) definitely relates to the issues.

The Court: I am going to strike the first, second, third, fourth, fifth and sixth words, and I will let him respond from the "I was" because I think that does respond to the question.

Mr. Chayt: Delete between "my" and "and"? The Court: Yes.

"A. I had pain in my back, sometimes in my foot and still had headaches a few times a week. I found when I went to a movie or concert after the accident I couldn't sit still for even an hour without pain. I was surprised at myself because I was very jumpy and excitable."

Mr. Siracuse: Your Honor, you have just ruled and counsel—

The Court: All right. It is not very serious.

"Q. Did the effects of the accident upon you have any effect upon the length of your stay in the United States? A. Yes.

"Q. What was the extent and significance of such effect?

A. I had planned to leave the United States by January
25, 1975 but because of my injuries and (148) the need for
continuing treatment, I preferred to continue with the
same doctor who had originally treated me at the hospital,
I extended my stay until April 24, 1975.

"O. How did you return home to Israel? A. By plane.

"Q. Did you feel any different physically on your return to Israel than you had felt while going to the United States? A. I found sitting in the plane much more uncomfortable and by the end of the trip, it was very painful for me. My back hurt especially.

"Q. What were the parts of your body that you injured in this accident? A. My head, my chest, my back, my left side and left hip and my left leg and left foot.

"Q. Since your return to Israel, have you had physical complaints with respect to these parts of your body? A. Yes.

"Q. If you have had such complaints, describe them.

A. The headache finally disappeared that summer after I came home. The back still gives me (149) trouble especially in cold and damp weather and during the day while I'm working.

"Q. With what frequency have you had such complaints?

A. I'm aware of my back condition all the time and I get pain in my back every day. When I wake up I feel stiff and pain, sometimes more, sometimes not bad. I also have pain during the day. It depends on what I do and the weather.

"Q. If there was any pattern to the onset of these complaints or their duration, state what pattern you have

observed? A. My work as an aircraft mechanic requires me to crawl into tight places and work bent over and sometimes to lift heavy equipment. Sometimes I must stop and rest till the cramp or pain is less so I can work again. As I said before, the changing weather affects my back and bending or lifting causes pain in my back. When the weather is bad the pains are especially bad.

"Q. With what frequency do you have complaints in any of the areas you injured in this accident? A. Now it is only my back but this bothers me almost all the time. Even when I don't feel pain, (150) I am careful. The mattress I use now is harder. I am careful not to sit in soft or low chairs when I go out and I avoid some activities I have enjoyed."

Mr. Siracuse: If your Honor please, I would object to the next answer.

The Court: I would think the objection properly lies, Mr. Chayt. The question really calls for a conclusion. I am going to sustain the objection to 65.

Mr. Chavt: I respectfully except, your Honor.

"Q. Describe the manner in which your injuries have affected you in terms of your occupation. A. I have had to push myself to keep up with the others. I feel pain many times on the job but try not to let it show if I can help myself.

"Q. Apart from your occupation, describe in in what way, if any, your complaints that you have experienced since this accident in those areas in which you were injured, affect your activities outside your employment. A. I have stopped sports. I had enjoyed playing soccer and sometimes volleyball and bowling. I am in the army reserve until I will be 55 years old. So far I was called back once since the accident for 35 days. I drive an

armored vehicle and operate a (151) radio. The seat in the armored vehicle was not designed for my back and the exercises we must do every morning cause me pain in my back.

"Q. If there is any other way in which you are affected by your injuries, please state this fully."

> Mr. Siracuse: Objection, if it please your Honor. The Court: Is there some aspect of your claim that involves his state of mind?

> Mr. Chayt: His anxiety over his injuries, certainly, your Honor. He is not a man that—

The Court: All right. You claim anxiety connected with the accident?

Mr. Chayt: Normal anxiety, yes.

The Court: I will allow the question. Over-ruled.

By Mr. Chayt:

"A. I am very concerned about my ability to keep up with my work and afraid of hurting my back even more so that I would lose this opportunity I have. I also have put on a lot of weight now that I am not as active as I used to be.

"Q. Do you have any present intention of returning to the United States? (152) A. I am on contract here for two years and I cannot even leave the county before mid-April. Even then, I am subject to call at any time after that for military reserve duty. If I can, I would like to go to the United States again."

Sworn to before Attorney Ben-Bassat and appropriately sealed by the United States Consulate.

Mr. Siracuse: May I respectfully ask your Honor to request counsel to give the date that this was taken.

Mr. Chayt: No problem. "Today the 28th day of January, 1976, Mr. Ytzhak Harel appeared before me, Dan Ben-Bassat, Advocate, in my offive Ibn Gvirol 30, Tel Aviv, Israel."

Mr. Siracuse: That suits my purposes, your Honor.

Mr. Chayt: Fine.

The Court: Thank you.

Mr. Chayt: If your Honor please, I would like to have this marked for identification with respect to those questions which were not allowed by the Court on the objection of counsel so that we have a record. It's already been docketed and it is part of the record in the case. So I don't have to mark it separately.

The Court: No. Keep in mind that it was duly (153) filed and is part of the record in this case which may be referred to.

Mr. Chayt: Thank you.

Dr. Budabin has arrived, your Honor. He is the doctor I intend to question, if I may.

The Court: Very well.

MURRAY BUDABIN, having been called as a witness on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination by Mr. Chayt:

Q. Dr. Budabin, would you be so kind as to inform the jurors of your license to practice in the State of New York and your qualifications and specialty. A. I was licensed to practice medicine in New York State in 1957. I am currently assistant attending neurologist at Mt. Sinai Hospital, associate attending neurologist at the Joint

Disease Hospital, and I am assistant clinical professor of neurology at the Mt. Sinai School of Medicine.

Q. Doctor, do you have occasion to write articles in

your field for the medical profession? A. Yes.

Q. Where, sir? A. My articles concern use of nuclear medicine in (154) the diagnosis of neurological injuries, and are published in the Journal of Nuclear Medicine.

I am currently preparing articles on the complications, neurological complications of cardiac surgery and other articles for publication in the Mt. Sinai and other appropriate neurological journals.

Q. Doctor, is the field of neurology in which you specialize limited total to the head? A. No, it is limited to the

nervous system.

Q. Where does that extend, throughout the body? A. The nervous system concerns the nerves, the spinal cord, and the brain.

Q. Is the spinal cord in fact a nerve or is it a group of nerves? I don't know which. A. It is a collection of nerves that transmit impulses from and to the brain to the extremities through the peripheral nerves.

Q. Did you have occasion to examine the plaintiff in

this case Ytzhak Harel? A. Yes, I did.

Q. When did you see him? On what day or date? A. I saw him on two occasions. I saw him on Mar is 20, 1975, at which time I performed a neurological examination, and I saw him on April 4, 1975, at which time (155) I performed a radio-isotope brainscan.

Q. How did he come to you? A. The patient was re-

ferred to me by Dr. Robert Zaretsky.

Q. What is Dr. Zaretsky's field of medicine? A. Dr. Zaretsky to my knowledge is an orthopedic surgeon.

Q. Was he patient of Dr. Zaretsky—I am referring to Mr. Harel—to your knowledge, when he came to see you? A. Yes.

Q. Before asking you your own findings and opinions, Doctor, with respect to this patient I am going to ask you to assist us with other medical aspects of the case, if you will.

Mr. Chayt: At this point, your Honor, I would like to first have the Fordham Hospital records.

The Court: That is Exhibit 3, I believe.

Mr. Chayt: Yes, your Honor. If your Honor please, the copy the doctor has is a photocopy which has been furnished to us by the hospital pursuant to the subpoena.

Q. If I may refer you to page numbers, doctor, on the left-hand corner in a circle are numbers which correspond to the page numbers that I am reading from, so you can refer (156) to the same pages.

Doctor, I refer you to page marked one, final diagnosis.

A. Yes, sir.

Q. Fracture of transverse process of the left fourth and fifth lumbar vertebrae. Do you see that, Doctor? A. Yes, sir.

Q. To the right of that, Doctor, are certain numbers under the letters ICDA code. What are those numbers, Doctor? A. Discharge diagnosis are usually codified. In other words, they try to give numbers to a particular condition and those I see: 1, condition; 2, fractures—I see four numbers—

Mr. Siracuse: Objection, if it please your Honor, unless there is some testimony as to what those numbers mean.

The Court: I would suggest that they are being offered subject to connection and if not connected you may move to strike.

Q. Doctor, I would now turn to Exhibit 4, which you don't have, and I am referring you now to page marked

"1" of the Trafalgar Hospital record, where they have a discharge diagnosis and a code number in front of you. What is the discharge diagnosis at Trafalgar Hospital and what is (157) the code number?

Mr. Siracuse: If it please your Honor, there are two items listed there and I would respectfully object to the second one that starts with the word "probable," or "possible."

The Court: Anything is possible, obviously. I am going to sustain.

Mr. Chayt: If your Honor please, it does read "probable."

The Court: Probable?

Mr. Chayt: Yes.

Mr. Siracuse: It is still the same thing.

Mr. Chayt: Oh, no. If your Honor is aware, there is a difference legally.

The Court: Let me see it.

(Pause.)

The Court: I read the word as probable, and I will permit the question.

Mr. Siracuse: So do I, sir, and I press my ebjection.

The Court: Overruled.

Q. Doctor, would you read what the diagnosis at Trafalgar Hospital are and what the code number is. A. Code number 805.4. Fracture transverse prostheses (158) L 3-4. Probable fracture—I'm sorry, I can't read the next doctor's handwriting—doctors' handwriting are bad for doctors. Something to do with the seventh right—

Q. Seventh rib? A. Rib.

Mr. Siracuse: Come on, counselor. It doesn't say that.

A. I don't know whether it says right or rib.

Mr. Siracuse: It says seventh right.

A. Could be rib.

Mr. Siracuse: Your Honor, I respectfully object to what it could be, sir.

The Witness: I read it as rib.

The Court: All right.

Q. Doctor, the code number 805.4, is that intended to signify a specific injury for let's say computers or other type operations so that we can tell what type injury the patient has in the hospital?

Mr. Siracuse: Your Honor, I don't know what—would your Honor advise the doctor not to answer questions while I am making objections.

The Court: Yes.

Mr. Siracuse: I don't know what connection this doctor has with Trafalgar or whether Trafalgar has any (159) specific way of doing things.

The Court: I don't think the connection has been made. If you go back, counsel.

Q. Doctor, with respect to those code numbers, are they dependent upon the particular hospital? A. No.

Q. Is there a purpose to these code numbers in each and every hospital? A. Yes.

Q. What is the purpose? A. To codify for statistical purposes the diagnosis by the doctors, the codes are put down by librarians.

Q. Now, then, Doctor, where it states-

Mr. Siracuse: By librarians? I object, then. I object to any code numbers going in there.

The Court: Do you know what these code numbers are as they are used by Trafalgar Hospital?

The Witness: It is international, and I am on the staff of Trafalgar Hospital.

Mr. Siracuse: May I be heard, sir? He says that these are put on by librarians. The doctor is the one who put in the discharge diagnosis—

Mr. Chayt: No, sir-

The Court: Please don't testify.

(160) Mr. Chayt: Exactly, your Honor. He is making a statement for which there is no evidence.

The Court: The jury will disregard statements of both counsel. The doctor has now indicated something that I was not aware of, that he was at the time in question on the staff of Trafalagar Hospital.

Q. In any event, Doctor, going back to the Fordham Hospital record where you see not only 805.4 which appears on the Trafalgar Hospital as a diagnosis, you see other numbers, 919.1? A. Yes.

Q. 807.—814— A. Yes.

Mr. Siracuse: I hate to be repetitions, but so the record is accurate, again I object to this, especially in light of the fact that the doctor testified that these numbers are included or inserted therein by librarians.

The Witness: Medical librarians.

Mr. Siracuse: Come on, Doctor, please.

The Court: Yes.

Mr. Chayt: The entries by nurses are admissible whether or not they are under a duty to report to the hospital.

(161) The Court: Yes, and entries by librarians are relevant to the extent that they are made in the regular course of business. If the doctor knows this, let him say so.

Q. Doctor, is it part of the custom and practice of each hospital to have entries such as this made? A. Yes.

Q. Doctor, let me ask you this: For each of those entries as to which there's been a noted code number, do you find the corresponding diagnosis written in by anybody, a doctor, nurse, librarian or anybody, to correspond to each of those numbers? A. No.

Q. Continuing with the Fordham Hospital, Doctor, page 4-

Mr. Siracuse: Your Honor, is that all that is going to be said as far as the numbers are concerned?

The Court: Yes.

Mr. Siracuse: I move to strike anything about numbers.

Mr. Chayt: If your Honor please, my contention-

Mr. Siracuse: May we approach the bench?

(At the side bar.)

Mr. Chayt: Counsel has made the point when the record went in, in argument to your Honor, that the final (162) discharge diagnosis doesn't state such and such, doesn't state such and such, and therefore it is not properly part of the record. I have brought this out solely for the purpose of showing that there are multiple diagnoses but the recordkeeping with respect to naming and identifying them isn't necessarily accurate.

I intend to use that on summation. I have no other purpose for it. Because he is going to infer that he only had this. I am going to read through the hospital record other places where he had other things that are in code number, but not

in that final entry.

Mr. Siracuse: Are we going to leave it to the jury to guess? That is what counsel is saying, that we leave it to the guess and surmise of the jury, sir.

The Court: I suggest that you ask this doctor if he examined, as he says, and as the testimony would appear to indicate, your client, what he found. You have got the medical record in evidence.

Mr. Chayt: I am going to read parts of it and ask him to explain it.

The Court: You can do that.

(End of side bar.)

The Court: I will strike the testimony on the numbers. I think counsel can go about it appropriately in (163) another way, with this witness. The witness obviously is knowledgeable and has examined the plaintiff, and under the circumstances you can get it out by his testimony rather than by some guesswork on the part of the jury.

The jury will disregard that portion relating to numbers.

By Mr. Chayt:

Q. Page 4. Patient was struck by-

Mr. Siracuse: Is that Fordham? Mr. Chayt: Yes.

Q. "Patient was struck by car. Complaining of pain left rib cage."

Incidentally, if I may interrupt, Doctor, if you find that I misinterpret any word, would you please interrupt me and so state. Going further:

"Lungs, diminished breath sounds, left side."

Skipping to abdomen: "Soft, moderate tenderness over LUQ region."

Is that left upper quadrant area of the abdomen? A. Exactly.

Q. They divide the abdomen into four sections-

Mr. Siracuse: Let him testify.

Q. Is that correct, sir? A. LUQ is the left upper

quadrant and it has four (164) quadrants, yes.

Q. Foley catheter inserted. What is that, Doctor? A. In order to permit the patient to pass his urine a catheter was in order into his bladder. It is called a Foley cather.

Mr. Siracuse: I object to that as being not responsive.

The Court: Overruled.

Mr. Siracuse: I respectfully except.

Q. Peritoneal tap negative. What is a peritoneal tap, Doctor? A. A peritoneal tap concerns the introduction of a hypodermic needle into the abdomen in order to explore for the presence of fluids such as blood or pus.

Q. Turning now to page 5—before I do, there is a word "trauma" on page 4. What is trauma, Doctor? We have heard that term in the course of this case. What does that signify? A. It refers to a medical etiology. It refers to the cause of a condition. It refers to a body meeting an object in an unexpected way.

Q. Would that be distinguishable from illness, in-

herent illness? A. Yes.

(165) Q. Now, Doctor, on page 5, admitting certification, rule out ruptured spleen—

Mr. Siracuse: Please, your Honor. This is really—

The Court: Is it in evidence?

Mr. Chayt: Yes, your Honor.

The Court: Then he can read from it.

Mr. Siracuse: Rule out is not a diagnosis, sir.

Mr. Chayt: It is what was done to the patient, including putting a needle into his abdomen.

The Court: The hospital records were introduced in connection with diagnosis, treatment and care. Do you see that what you are now reading—

Mr. Chayt: Has to do with the treatment that this patient underwent in this hospital and their final conclusion.

The Court: I suppose anything in the record has to do with the treatment he underwent.

Mr. Chayt: No, your Honor. There are things he wants to read which don't have to do-

The Court: Counsel, stop making speeches. That was inappropriate. The jury will disregard counsel's remarks. Ask your next question. I will rephrase it. I will listen to it. Go ahead. The jury will disregard (166) the last question.

Mr. Chayt: I intend to read, your Honor, the admitting certification, which starts with the words to which counsel objects, "rule out ruptured spleen and space transverse process of L-3."

The Court: You have read it. Ask your question.

Q. Doctor, when this is done, what is the purpose of admitting certification? What is the function of that entry? A. The admitting certification is the diagnosis the patient bears when he enters the hospital before any treatment is rendered. It may be wrong or right.

Q. Now then, Doctor, we go to the twelfth day recertification—

Mr. Siracuse: Under those circumstances I ask that the jury be instructed to disregard anything with respect to a ruptured spleen.

Mr. Chayt: Ultimately they found none, I will so stipulate. It's with respect to what they did for it.

The Court: The jury is entitled to know the treatment afforded. I will instruct the jury that there was no rupture of the spleen.

Mr. Siracuse: Thank you.

Q. Twelfth day recertification. What is the purpose (167) of noting this? A. In order to decide whether the patient required continued hospitalization.

Q. One, fracture of transverse processes of L-3 and L-4; two, blood injury to abdomen; three, R/O ruptured spleen, rule it out. Possible fracture of left sixth rib.

Doctor, if I may, with respect to this R/O, or rule out, what does that signify? A. It means it was a condition for which the patient was considered to be a very good candidate, that he might have had the condition.

Q. And they are checking to see it? A. It's not entirely ruled out, it's not ruled in. It is under suspicion.

Q. Doctor, is it good custom and practice to make such diagnosis of possibility or probability so as to examine whether the patient ultimately has them? A. It's good to admit what you don't know.

Mr. Siracuse: Objection.

The Court: I will let it stand.

Mr. Chayt: I will withdraw that—

The Court: You withdraw that?

Mr. Chayt: No, I was going to do something else.

The Court: Let's get on with it.

(168) Q. Page 6, would you turn to that, Doctor. Previous history tracheostomy when he was four years old for unknown disease. No ND, no drug addiction. What is ND, Doctor, do you know offhand? A. No VD, sir. Vernereal disease.

Q. No drug addiction.

Mr. Siracuse: May I inquire as to the relevancy of all this, sir?

Mr. Chayt: Your Honor, there is a physical

background relevant to the final diagnosis.

The Court: The fellow said he was feeling fine, he was in good health physically and mentally just before the accident.

Mr. Chayt: And the hospital confirms it, is all I'm trying to say.

The Court: Fine: Let's get on with it. I didn't know that the matter was in contest.

Q. Page 7: Circulatory. Mild tachycardia. What is tachycardia? A. Tachy means rapid and cardia means heart. It means rapid heartbeat.

Q. Is that a normal condition, Doctor? A. No.

Q. This is the initial physical examination on his (169) admission to the hospital, is that right? A. So it says.

Q. Skipping down a line, mild generalized-

Mr. Siracuse: No. Why are you skipping?
Mr. Chayt: If your Honor please, he can read
any other part he wants.

The Court: That's right. He is going to skip for his purposes and the other lawyer will get up and say what he wants to say. They have the right to do this. You liste.

Q. Mild generalized abdominal—I read "guarding," is that right? Can you make that out?

Mr. Siracuse: No, I can't.

A. Yes.

Mr. Siracuse: Yes, what?

The Witness: Yes, guarding. I'm sorry, counsel, I don't know where you are now.

Q. After "guarding" comes "and back pain." And—A. After guarding comes no rigidity.

Q. I don't know if we are reading the same part. A. That is history.

Q. Up there, Doctor. A. I'm sorry. I read from the wrong area.

(170) Q. "General abdominal guarding and back pain."

A. Mild generalized abdominal pain and back pain.

Q. And then skeletal— A. Skeletal system.

Q. Pain at the—I can't make out right or left ankle.

A. Right.

Q. Nervous system. No seizures, no paralysis, no

motor or sensory deficit. A. Yes.

Q. Physical examination. Skipping down to the word cardiovascular. Tachycardia and no murmur, no rales. Does that refer to his heart, Doctor? A. Yes, sir. I'm not sure about the third in—something—rub.

Q. No rub.

Mr. Siracuse: I object to anything with respect to the heart, sir. There is no claim of anything dealing with the heart in this case. He can read this whole thing from a negative point of view.

Mr. Chayt: If your Honor please, tachycardia is nothing negative, there is a positive finding in

the hospital.

The Court: Let's have the doctor testify. Is (171) this relevant to one of your claims? If so, which one?

Point it out to me in the pretrial order by which this trial is being governed. Don't go off on your own.

Mr. Chayt: You may be right, your Honor.

(Pause.)

Mr. Chayt: Your Honor, it is not worth the bother—

The Court: No, answer the question, please.

Mr. Chayt: I can't find my copy of the pretrial order. I am withdrawing it.

The Court: Let's get on with it.

Q. Under cardiovascular, abdomen, generalized tenderness and guarding, is that correct, Doctor? A. Yes.

Q. What does that signify to you medically? A. That the patient has diffuse pain in his abdomen.

Q. Impression, blunt abdominal injury; is that correct Doctor?

Mr. Siracuse: I would object to an impression, if it please your Honor.

The Court: Rephrase the question.

Q. What is the significance of the doctor writing down after an examination, impression, and then certain (172) findings? A. The doctor examines the patient and takes a history based on his concept of how the diagnoses fit together, he writes down an impression which is subject to being proved. And that impression is a conjecture.

Mr. Siracuse: Therefore, your Honor, I respectfully object and ask that be stricken.

The Court: Strike it.

Q. Chest X-rays, neurological watch, X-rays reveal, one: cortical fracture of left sixth rib; two: fracture of transverse process of third lumbar vertebra; is that correct, Doctor? That is page 8. A. The reading is correct.

Q. Do you see any reference to a fourth lumbar verte-

bra anywhere here? A. No.

Q. Page 9: Trauma resident admission note. CC—would that be chief complaint? A. Yes.

Q. Hit by a car on the left side, abdominal pain. PI,

or PE. A. History of present illness, HPI.

Q. 21-year-old white male was admitted from the ER—the Emergency Room—because of MVA. Patient was (173) standing allegedly by the sidewalk when an oncoming car hit him on the left side. No lost consciousness. Was brought to the ER. Complains of abdominal pain with apparent injury, abrasion to the left thoracoabdominal region.

Plaintiff was complaining of back pain, generalized ab-

dominal pain as well as pain in the local region.

Do you know to which local region this is referring to, Doctor? A. I assume the left side of his chest.

Mr. Siracuse: I object.

The Court: Sustained Strike whatever his assumption is.

The Witness: He cannot do any better.

The Court: Strike it.

Q. Past history: Tracheostomy during infancy for respiratory distress, no other diseases or illness. GR, general appearance, healthy, well-developed, well-nour-ished, conscious, alert, in mild distress, slightly— A. Pale.

Q. Pale. Not dehydrated.

Turn to page 10. No nucal rigidity. What does that mean? A. His neck was not stiff.

Q. Scar of previous tracheostomy. What is a (174) tracheostomy, Doctor? A. A tracheostomy is an opening of the trachea for the purpose of ventilating the patient's lungs.

Q. Where is it done? A. It's performed on the patient's trachea.

Q. Indicating the front part of the neck?

Mr. Siracuse: Just so there is no confusion, this is something that preexisted this accident?

Mr. Chayt: Absolutely.

The Court: That was my understanding as well.

Q. "Chest symmetrical, tenderness on left axillary region with abrasion." Where is the axillary region? A. The armpit area.

Q. Abdomen, going down to the fourth line on that, "abrasion over the left flank." Where would that be? A. The left flank is opposite from the right flank. This is the left flank here. Over the kidneys.

Mr. Siracuse: That is under the heading abdomen. The Witness: It's all part of the abdomen.

Q. Back, no deformity, localized moderate terminus over the lumbar region. Extremities, no deformity, swollen tender, lateral aspect of left foot; is that correct? A. Left aspect, left foot, or lateral aspect, left foot.

(175) Q. Skipping down to LS sparring, fracture of

transverse process of third lumbar vertebrae have a chip and fracture, transverse process L-4. A. Yes, sir.

Q. What is the word to the left, there are a couple of words to the left of "and chipped fracture, transverse process L-4"—oh, management EB; Management Emergency Room.

Mr. Siracuse: I can't read it.

A. Lumbosacral sparring, fracture left—and chipped fracture transverse process of four—

Q. I wasn't going to read that anyway. Would you go down, Doctor. Four: Quadrant tap was performed. Negative for blood.

What is that, four quadrant tap is the insertion of—A. The four quadrant tap means that the patient was examined in the four quadrants of his abdomen for the presence of fluids such as blood or pus.

Mr. Siracuse: And that was what? What was

Mr. Chayt: You ask him. If your Honor please, counsel wishes to ask a question.

The Court: Let's ask the next question. Let's (176) not argue, gentlemen.

Q. Foley catheter, clear urine. The next is an impression on page 11.

Mr. Siracuse: I object to impression, if it please your Honor, especially based upon the doctor's testimony with respect to the fact that the impression is a conjecture.

The Court: I will allow it and I will leave it to the jury whether they wish to accept the impression or reject it.

Mr. Siracuse: I respectfully except.

Q. One, blunt abdominal injury, rule out ruptured spleen. Two, cortical fracture, sixth left rib. Rule out blunt chest injury. Three, fracture, left transverse process, third lumbar vertebra, fracture fourth transverse process, L-4, chip fracture. Plan, vital signs and neural watch.

What is a neural watch, sir? A. A neural watch is a means that the hospital personnel have of knowing whether the patient is going to go into a coma at a certain point, by charting his vital signs, his respiration, his level of consciousness, and behavior.

At a certain point a patient might exhibit untoward signs-

- (177) Mr. Siracuse: Your Honor, I object. It has nothing to do with this case.
- Q. Was a neural watch done on this patient? A. Yes, sir.
- Q. Would you turn to page 41, Doctor, and tell us for how long they did a neural watch on Mr. Harel after he arrived on the day of the accident? A. Four days, 12/24 through 12/27.
- Q. Does that have anything to do with spinal injury to the vertebrae? A. No, sir.
- Q. What was the significance to you that they were watching this man neurally and watching his vital signs?

Mr. Siracuse: Objection, your Honor, if there is nothing positive.

The Court: I will allow the doctor to give us his opinion.

A. The watching of vital signs is to avoid the complications of a patient suddenly being in a coma, if they suspected he might go into coma.

Mr. Siracuse: I object, your Honor.

The Court: Yes, I sustain that. How would you know what they suspect, Doctor? Did you talk to them? Yes or no.

(178) The Witness: Did I talk to the people who wrote the record?

The Court: Yes. The Witness: No.

The Court: Very well. Strike it. Let's get on with it, gentlemen.

Q. Doctor, there is a notation, tube NPO. What does that mean, on page 11? A. No fluid by mouth.

Q. And then IV support? A. Means that they should give him intravenous fluids rather than oral fluids.

Q. Next, down on the bottom of page 11, case was discussed with Dr.—looks like Sayer. IVP was suggested. What is that, Doctor? A. An intravenous pyelogram.

Q. Although the urine is clear, to rule out completed transsection and—looks like pedical injury; is that correct? A. No. To rule out completed transsection and—

Q. Pedical injury left kidneys.

Mr. Siracuse: He said it didn't say that. Mr. Chayt: I am asking what it says.

A. It could be pedical injury left kidney. I think (179) I know what that means.

Q. As this indicated in all fracture of lumbar vertebrae. Next page, 12. IVP was done. Would you now tell us what the IVP procedure that this patient was given consists of?

The Court: Do you know for a fact what the procedure was? Were you there?

The Witness: Sir, I saw this man in the office. I never saw him in the hospital.

The Court: Were you there when the procedure was applied?

The Witness: No, sir.

Q. What is an IVP procedure?

The Court: He can describe it that way.

A. I didn't get a chance to describe it yet. I am not a lawyer, I'm just a doctor. The rules of evidence, you know.

Mr. Siracuse: If your Honor please-

The Court: Yes, I didn't think that remark suited anybody's interests. First, I'd ask counsel to ask his questions properly, and I suggest that the doctor respond to the questions.

Mr. Chayt: Thank you, your Honor.

(180) Q. Doctor, what is an intravenous pyelogram? A. It concerns the introduction of a contrast medium into a patient's vein so that its course through the kidneys, ureters and bladder may be studied.

Q. The next entry when they did this particular test on this patient, where it says the left and right kidney showed normal excretory function of both kidneys proved the kidneys to be normal in his case, is that correct, Doctor? A. I will assume so.

Q. Progress record, page 13. December 26, 1974, start full liquid diet on that day. Doctor, would that signify that he had been kept to the regime of no oral intake through the mouth up to the 26th when that entry was made? A. I would assume so.

Mr. Siracuse: May I respectfully ask the Court to ask counsel not to tell the doctor what it means, but to ask him what it means.

The Court: The answer has been heard. Object to the next question if it isn't appropriate.

Q. December 29, 1974 on the same page, transverse process L-3 and L-4. Blood injury of abdomen. Pain left thoracic cage and—I can't make out the word, by demerol. A. Removed.

Q. What is demerol, Doctor? (181) A. Demerol is a

narcotic drug which is an analegsic for pain.

Q. Page 14, Doctor. Called to see the patient, who was complaining of pain over left lower part anteriorly and left upper quadrant pain increasing; that without deep breathing— A. With.

Q. With deep breathing and movement. Chest, going down to chest. Shallow breathing. Symmetry— A.

Symmetrical, it means.

Q. January 5. Page 15. About a third of the way down the page on page 15. Patient still complains of

pain. 1:30 a.m. no acute distress.

What is the significance of the word "acute" when it is used medically, Doctor, as distinguished from distress? A. No new condition. That there is no new condition at that moment.

Q. January 5. Page 16. C/O, an arrow, pain. What

does that mean? A. Diminished pain.

- Q. Down to the word "chest." Still tenderness over left lower anterior part. Abdomen still moderate tenderness on left upper quadrant. Impression—
- (182) Mr. Siracuse: If your Honor please, may I suggest that there are certain of these things that—I have an opportunity to read where counsel leaves off because I think it is part of it. I recognize it is his examination, but if he is going to read part of something and leave something out, it's going to be rather difficult to get back into it and know what's going on.

Mr. Chayt: Your Honor, I am reading the part

that is relevant to me.

Mr. Siracuse: I suggest he read the entire examination of the chest--

The Court: He has determined it is in his best interest to read it his way. I have to then give you the opportunity to read what you want to read. Let's get on with it, gentlemen.

Mr. Chayt: Your Honor, won't you read what he said I should read so the jury should hear what he thinks is there. "Abdomen, still moderate tenderness on left upper quadrant, no definite rebound tenderness, no guarding," is that correct, counsel?

Mr. Siracuse: That is part of it. Mr. Chavt: What else is there?

The Court: Gentlemen, please. We will take a short recess. I suggest from this point on you are not to (183) discuss matters with each other. Sit down. We will excuse the jury. I want you to confer so we have an organized examination here.

The jury is excused for a minute's recess.

Please sit down and discuss the case among yourselves.

Keep an open mind on all facets of the case untill it has been given to you following my charge.

(The jury left the courtroom.)

(Recess.)

(In the courtroom, in the presence of the jury.) By Mr. Chayt:

Q. Page 17 of the record, Doctor, progress record through January—I can't make out the date in the left-hand column. 8/75? A. Yes.

Q. Patient still complains of pain in the left lower chest and lower back: Plan: spinal brace to be given. Page 18. Consultant's opinion. PM&R. What is that? A. PM&R means physicial medicine and rehabilitation.

Q. The consultant's opinion, 27-year-old hit by auto, 12/24/74 with fracture left seven rib, fracture transverse process L3-L4. Has been complaining of pain on deep breathing (184) left chest and pain low thoracic spine. Exam. Tender, T9-10, SLR and bilaterally.

What is T-9 and 10, Doctor? A. Thoracic 9th and 10th vertebrae, or ribs.

Q. What is SLR, Doctor! A. Separate leg raising positive bilaterally.

Q. Positive means there are findings? A. Yes.

Q. In other words, it is not normal? A. If it is negative it is normal. In this case positive means abnormal.

Q. With respect to the thoracic spine, how many thoracic vertebrae are there and from where do they extend? A. Twelve. From the seventh cervical vertebra to the first lumbar vertebra, which is where you are indicating.

Q. How many lumbar vertebrae are there? A. Five, usually.

Q. Normal condition is five lumbar vertebrae? A. Usually.

Q. Page 19. Flat film, an X-ray reading of the abdomen reveals fractures involving the left transverse processes of the third and fourth lumbar vertebrae.

Page 20. Left ankle. Study shows soft tissue (185) swelling at the level of the lateral malleolus. Left foot. Examination of the left foot also shows soft tissue swelling at the level of the lateral foot.

Doctor, with respect to the left foot, would these X-ray findings signify to you a normal or abnormal condition?

A. Abnormal.

Q. What would they signify to you if the patient was complaining of pain in the left foot which he hadn't had prior to the accident? A. That something had happened to cause him to have pain in the foot.

Q. Doctor, is there any diagnosis with respect to the left foot anywhere in this Fordham Hospital record? A. There's none on the written discharge summary.

Q. With respect to the thoracic spine of which he was complaining of pain, is there any final diagnosis with respect to his upper back? A. There is none in the written summary.

Q. Page 21, chest X-ray report. The studies show an irregularity of the seventh rib which would represent an old or recent trauma or an anatomical variant.

Page 23. Left ribs. There has been no change in the localized distortion of the cortex of the left seventh (186) rib. However, the time lapse between the first study and today's study is not long enough. I would recommend another followup study in another ten days if clinically indicated.

This is dated January 2, '75.

Page 26. Physical medicine and rehabilitation note. Patient seen again this date for hot packs to thoracic spine and left chest. Mr.—looks like Ytzhak did not tolerate receiving them in sitting position yesterday and subsequently received thoracic one while lying prone. Patient complained that lying on one under the left ribs was too uncomfortable. Patient tolerated hot pack for fifteen to twenty minutes.

Therapy note, January 3, '75. This patient is a 22-year-old male, HBC—what is that? Do those letters mean anything to you, Doctor? A. Hebrew-born Caucasian.

Q. Very good. 12/24/74, in which he sustained a fracture of left transverse processes of L-3 and L-4, also fracture seventh rib on left. Patient has no pain in lumbar area but does have pain at T-9-10. New X-rays taken but not yet reviewed.

Also complains of pain on deep breathing in left chest area. Patient is moderately mobile in OOB.

Is that out of bed? (187) A. Yes.

Q. And is ambulatory with somewhat stooped posture. He was treated today with hot packs to thoracic spine and left chest while side lying. Plan to have patient sit for next treatment since he did not tolerate side-lying position well.

Medication record. On page 29 it shows valium, seconal, demerol and darvon.

What are those medications for, Doctor? A. Valium is medication that is used to release muscle spasm. Darvon is a mild analysis, and demerol is a moderately strong analysis medication for control of pain.

Q. Now we turn to page 42. Nurses' notes.

"Patient was admitted to ward via stretcher. IV fluid in progress. Complained of pain in back. 12/24/74. 8:30. Patient admitted to ER complaining of abdominal pain, pain in left foot. Foley catheter in situ. Patient in"—I am skipping down two lines—"Patient complained of headache.

"11 AM. 500 ce absorbing, or R/L."

What is that? A. I don't know.

Q. "Ace bandage applied to left leg."

What would be the significance of that, Doctor? (188)

A. The significance of applying a bandage to a leg is that someone thought something was wrong with it.

Q. "12/25." On page 44. "Complete bed rest. 2 PM

on December 25. Foley catheter discontinued."

That is the tube up to the bladder, Doctor? A. Yes.

Q. They removed it on the 25th? A. Yes.

Q. "IV in progress. NG tube arrow suction is draining." What does that mean? A. On what page are you reading?

Q. I am reading on page 44. A. Going to section.

Q. What is an NG tube? A. A nasal gastric tube. It's a tube which is administered to the stomach via the nose in order to absorb secretions in the stomach. Through the espohagus to the stomach. A tube that connects the oral pharynx to the stomach.

Q. And this patient had that treatment administered?

A. Yes.

Q. "Ankle swollen, Ace bandage removed and reapplied. Patient in bed in upright position. Complains of pain in right side of back. NPO maintained."

(189) Still not allowed to eat, is that right, Doctor, according to the orders here? A. Yes.

Q. December 25 at 4:00 p.m. First line, Levine tube to— A. Gumco suction.

Q. What is that? A. It is the thing that sucks, applies force at the end of the tube to extract the contents of the stomach via the tube into a machine.

Q. That is the same nasal tube you described to us before and that is the machine it is hooked up to? A. Yes.

Q. "Patient somewhat restless. Can't call nurse"— A. "Continues."

Q. "Continues to call nurse. IV in progress."

"At 9 p.m. the Levine tube was removed on December 25 by Dr. Syed," is that correct? A. Yes.

Q. Going down to December 26, 2 p.m. entry, "NG tube removed." That means on the 26th at 2:00 p.m. they removed the nasal gastric tube that you described? A. Yes.

Q. "Full liquid diet taken and tolerated well. (190) Remained on bed rest. More cooperative today. Continues to complain of pain. Medicated with darvon, relief noted.

"December 26, 2 p.m. Bedrest maintained. IV in progress. Liquid diet tolerated well. Medicated for pain. Relief noted.

"9:55 p.m. Medicated for pain. IV still in—I can't make it out—IV something in— A. "IV fluid in progress."

Q. "Diet tolerated well. IV fluid in progress. Diet tolerated well."

"December 27, 5 p.m. IV removed, somewhat restless earlier. Uncomfortable, sleeping at present.

"December 27, out of bed into wheel chair. Diet taken well. Complaining of headache at times. Otherwise general condition appears fair. Feeling as comfortable as possible."

Page 46. December—I can't make out that entry, on the top of page 46. A. 28.

Q. "Slept for a long period. Medicated for pain times one." That means once they gave him medication for pain?

A. Yes.

Q. "Very little effect. December 28"—going down to the fourth line—"remarked of on and off pains. December (191) 28 8 p.m. Complained of pain left shoulder. Medicated.

"December 29, 8 p.m. Bed rest maintained, patient complained of soreness in left side and hip when moved.

"Transferred, complete bed bath given. 12—December 30, IV infusion, running in well."

Would that indicate he still has a tube with a bottle above him? A. He still has an IV infusion.

Q. On December 30, six days later. "Complains of pain in back, mouth appears very dry, difficulty eating while breathing."

December 31, "IV infusion, complains of pains. Refused the medication when it was given to him.

"Patient he was not certain it was Demerol because the ward was dark."

Page 47, December 31, "IV removed at 8:30 a.m." It looks like December 31, 3 to 11. "Out of bed, ad lib." What does that mean? A. At liberty.

Q. With headaches, back page.

"January 1, out of bed, complained of slight headaches, walks with a lean or head—"

(192) A. "Lean towards right side."

Q. Do you have an opinion, Doctor, as to whether the injuries to his back which this patient is shown by the record to have sustained would cause him to walk in that manner? A. Yes.

Q. What is your opinion on that? A. The injuries sustained caused him to walk in that manner.

Q. Continuing. "January 1, complained of pain, medicated. January 2, complained of pain, medicated with Darvon. At 3 a.m. on January 2, patient came to the nurses' station, demanding Demerol. Patient was told that Demerol was discontinued. Patient continued to advance on the nurses' station demanding Demerol only. Security paged and responded.

"Mrs. Brooks, the supervisor, also explained the situation to the patient. Dr. Petrolis paged as to whether the patient could have Demerol for his pains. Dr. Petrolis stated that he could not come up at present and to repeat Darvon, if the patient will have it. Same given.

"Patient did not settle to sleep again.

"January 2, complained of pain in"—looks like "R is selected to L side. Medicated, walks bending (193) forward a little.

"January 3, 2:30 p.m. Slight pain in the back and right ribs. To be transferred to 3 South." Looks like south.

"January 3. Transferred to 3-S ambulatory. January 3, transferred from 4-SW, out of bed ad lib. Complained of backache. Darvon given as ordered.

"January 4, 2 p.m. Out of bed ad lib, complaining of

pain. Medicated.

"January 4, complained of chest pains. Dr. Mecchini—I can't make out the spelling—notified. Visited and examined the patient.

"January 5, patient taken to X-ray, experiences severe

pain on moving to stretcher.

"January 5, complaining of pain in lower left side of abdomen. January 5, medicated, given as ordered, complained of slight pain.

"January 8, medicated, given. 2 p.m., no complaints.

"January 8, ambulance drivers from Trafalgar Hospital arrived to take patient to Trafalgar Hospital."

Going back to the discharge summary, Doctor, this discharge summary is dated 3/5/74. Do you have the page,

it's around page 5 or so. This patient left the (194) hospital on January 8th for transfer to Trafalgar, is that correct, Doctor? A. It says "Discharge date, January 9."

Q. The nurses' notes have him going on January 8 by

ambulance. In any event, January 8 or 9.

Is it customary, Doctor, for final discharge summary to be made up some time after the patient leaves the hospital?

A. Yes.

Q. That is made by the patient or one of the physicians in charge? A. The physician assigned to the summary.

Q. Going down to Doctors' Impressions on Discharge, would you read what he states? A. One: Blunt abdominal injury. Two: Cortical fracture of sixth rib—

Mr. Siracuse: Objection, your Honor, to the reading of any impressions.

The Court: Sustained.

Q. Go on to the hospital course. A. "Patient was admitted. He was kept without NPO and IV fluids. Hematocrit was done every eight hours. Patient did well, no drop in hematocrit. Abdominal signs subsided. Patient was started on diet later on. Physiotherapy (195) was given for the lower back and hot compresses and bed exercise were given. Patient was able to sit up and later on move in wheel chair. He was started on crutch walking and finally he wanted to be transferred to Trafalgar Hospital, so he was transferred there."

Mr. Chayt: Your Honor, I have completed with the Fordham Hospital. I would indicate our summons called for production of the hospital chart together with any and all X-rays concerning his confinement.

Mr. Siracuse: That is the same with Trafalgar?
Mr. Chayt: The same for both. I asked for everything and this is what came in.

Q. Now, Doctor, I ask you to turn to the Trafalgar Hospital records. On page 1, discharge diagnosis—we already have that.

Skipping down to Summary "21-year-old male struck by auto on 12/24/74. Rx initially n Fordham Hospital."

Does that mean completed initially at Fordham? A. Yes.

Q. "With bed rest. Transfer for further care. On exam there was tenderness upper"—I can't make it out— A. Neither can I.

Q. "Reflexes were intact." Next line, under bed rest, "Patient continues to improve and corset was obtained. (196) Patient discharged on January 14, 1975, to be completed as an out-patient or at the office."

Is that the signature of Dr. Robert Zaretsky, if you know?

A. No. I don't know.

Q. Going on to page 3, progress record of Trafalgar Hospital, history. January 8, '75. "Chief complaint. He is having low back pain right side of thorax"—is that the chest, the thorax? A. Yes.

Q. "And left leg since fourteen days ago when he was walking on the sidewalk and was hit by a car. He lost consciousness and only he realized the accident when he was in the emergency room"—

Mr. Siracuse: Your Honor, I am going to object to this history, since it is not the history of the initial treating physician, sir, and with respect to any history about loss of consciousness, we already have it.

The Court: Sustained. It is cumulative.

Mr. Chayt: If your Honor please, it is not cumulative in the sense that it is a different history.

The Court: So you have two histories. Aren't they cumulative, one of the other?

Mr. Chayt: One says lost consciousness, the (197) other says not, your Honor. He didn't object to one. I am offering the other to show the contradictory effect.

The Court: I have ruled.

Q. "Was here until today. Denies serious illness." That is the past history, is that right? Denies serious illness.

"Surgery. Scar of either possible or probable tracheotomy"—he doesn't remember—skipping down, "scar anterior low aspect of neck." Skipping down, "PMI"—this is in the middle of line Do you see those letters? A. Yes.

Q. What does that mean? A. Point of maximum impulse.

Q. "Fifth vertebral space, slight tender. Right side between 8, 9, 10, 11, 12th ribs." I can't make that out. Something about axillary lines. "Abdomen soft."

Going down to the back "marked tender le L-4, L-5, to palpation, increase on motion of legs."

"Extremities old hematoma left foot A2 aspect, nontender."

What is a hematoma, Doctor? A. It is a collection of old blood, in this case.

Q. I will skip past the impression. Page 4. Orthopedic surgeon's attending notes. Skipping the third (198) and fourth line—"Patient, 21-year-old, walking on sidewalk December 24, '74, struck by motor vehicle. He was rendered unconscious, had amnesia for accident. He was taken by ambulance to Fordham Hospital where he was treated with bed rest and medication for pain. He also had a few physiotherapy treatments. X-rays taken were said to reveal fracture of several transverse processes of the lumbar spine and fracture of the left seventh rib. At present patient appears to be improving. Rx or treatment, there is ecchymosis and swelling of the lateral aspect of the left foot."

What is that? A. Discoloration due to blood.

Q. "Examination of back spine reveals moderate spasm with marked motion defects in all planes."

What is the spasm that they are talking about? A. It is a muscular condition in which the muscle tightens because of an irritation, in this case pain.

Q. "The left rib cage is turned. Straight leg raising on

the left."

What does that signify? A. Straight leg raising is positive on the left. That means if the leg is extend and lifted there was pain.

Q. January 10, '75, "X-rays revealed there were fractures of transverse processes of L-3 and L-4," and then (199) it says "possible fracture."

> Mr. Chayt: Your Honor rules that out. I won't read that.

The Court: Yes.

Q. "Left foot negative. He was complaining of pain in the left rib cage and back. Patient will now be allowed bathroom privileges and shower. Corset to be ordered."

January 11, page 5. "Patient noting pain in the back. He will continue with bed rest and gradual activities. Left chest painless now. General condition one of improvement."

January 13, "Corset"—I can't make the next word out— A. "Out of bed," maybe.

Q. "Corset, out of bed. Patient much improved. Discharged tomorrow." In fact, he was discharged on the 14th.

Going to page 10, Doctors' Orders, No. 9, do you have

that, Doctor? A. Yes, sir.

Q. "Bed board, permanent." What does that mean, Doctor? A. They want the patient to have a board placed under his mattress and for it to remain there until he leaves the hospital.

(200) Q. Going on to the nurses' notes now. On January 8, "complains of back pain, made comfortable. Medicated

for pain."

The next entry I have is page 12. I don't have any date—Friday 12/28. "Complained of pain. Medicated. 8:24, bath taken with assistance. Seen Dr. Zaretsky. Mild limping gait."

Saturday, January 11. "Patient slept for long periods." Monday, January 13. "Patient slept for long periods."

Finally, January 14, "discharged at 8:40 a.m."

Now, Doctor, I am going to ask you to assist me in further aspect before I return to you. I have a deposition of Dr. Horoszowski, who is in Israel, and I offer the deposition of Dr. Horoszowski, and I would ask the doctor to assist me by reading the answers. I have a copy for the doctor to follow. If your Honor please, may we have the shadow box?

The Court: Yes. Can the jurors see? The witness can see.

Q. This is a deposition, the testimony of Dr. Horoszowski as taken by Attorney Ben-Bassat on January 28, 1976, in Tel Aviv by written questions submitted by both (201) sides. Doctor, would you be kind enough to read the answers. A. Yes.

Q. "1. Q. What is your full name and residence address? A. Henri Horoszowski, Jeremiah 13, Ramat Chen, Israel.

"2. Q. What is your occupation? A. I am a physician.

"3. Q. Are you authorized to practice medicine in the State of Israel? A. Yes.

"4. Q. Are you authorized to practice medicine anywhere else! A. Yes, in France.

"5. Q. If you have a specialty in the field of medicine, what is that? A. I am an orthopedic surgeon.

"6. Q. What qualifications do you have, in terms of education, experience and professional recognition as a physician? A. I graduated from Paris Medical School in 1963. I was licensed to practice medicine there in 1963. I was an attending physician in neurosurgery at Salpetriere Hospital. I came to Israel in 1965 as (202) a general surgeon. I am qualified in Israel as an orthopedic surgeon.

"7. Q. If you are associated with any hospitals, set forth their names and locations? A. I am Deputy Director of the Claim Sheba Medical Center, Department of Orthopedic Surgery. This Center is a branch of Tel Aviv University.

"8. Q. What are the governmental requirements you met for practicing medicine where you maintain your practice? A. There is a license requirement which I have met.

"9. Q. What is the address at which you conduct your practice? A. 40 Yona Hanavi Street, Tel Aviv.

"10. Q. Have you examined medically the plaintiff in this case, Ytshak Harel? A. Yes.

"11. Q. Did the plaintiff, Mr. Harel, ever consult with you before December 24, 1974? A. No.

"12. Q. If you examined him after December 24, 1974, what was the first date on which you saw him professionally? (203) A. I first saw him on September 17, 1975.

"13. Q. Where did this occur? A. At my office.

"14. Q. Did you see him on this occasion for the purpose of undertaking treatment of him, if that was needed? A. Yes, that was the purpose of my seeing him.

"15. Q. Did you take a history from the patient, Ytzhak Harel? A. In the natural course of the examination, I took

a history, yes.

"16. Q. What history, if any, did he give you pertaining to his condition at that time? A. He told me that he had been born in 1953, that on December 24, 1974 he was in good health, but then was struck by an automobile while on a sidewalk. He stated that he was rendered unconscious"—

Mr. Siracuse: If your Honor please, there are areas of this answer that will be objectionable because they are hearsay. He is giving conclusions as to diagnosis, and so forth, and when we come to those may I be deemed to have an objection?

Mr. Chayt: May we approach the bench?

(204) The Court: Yes. (At the side bar.)

Mr. Chayt: Mr. Harel told the doctor what he was informed or had been told about his fractures, and so forth. However, this is part of the doctor's history which he has to obtain from the patient. The mere fact that the patient states it in the medical terminology that was given to him I don't think makes the history more objective than if given in English.

Mr. Siracuse: Whatever diagnosis he tells him would be hearsay and simple hearsay. I don't know whether this doctor had the advantage of any hospital record or medical reports in front of him. That would have been the only way for him to obtain any history with respect to what the diagnosis was.

The Court: Do you concede that Dr. Horoszowski was asked by the patron to diagnose and treat him?

Mr. Siracuse: I don't know if that is so, although he says so here. He only saw him twice, sir. In all this time, that's all we know. If this is a treating doctor I don't know if he saw him for the purposes of giving an opinion to the doctors or lawyers or what. He does say for treating.

Mr. Chayt: Your Honor, I asked that foundation (205) question in order to be able to find out whether or not I can put the history in and the doctor said yes.

The Court: I'd suggest in view of that response the history will be admissible and I would ask counsel if they wish to comment on the applicability or nonapplicability of Rule 803 sub. 4.

Mr. Chayt: I'm afraid I don't know the number, your Honor.

Mr. Siracuse: I have to confess ignorance of that specific rule, too, sir.

The Court: You gentlemen are practicing in this court. You are not across the street or in some other court. Congress saw fit to enact rules on this subject. If you are not familiar with 803 sub 4 at this

juncture, I suggest you become familiar with it forthwith. Do you have your copies of it?

. -. Siracuse: No, sir.

In Court: I will read it to you. AL 3E4: The following are excluded by the hearsay rule even though the declarant is not available as a witness: statements of medical diagnosis and treatment; statements made for purpose of medical diagnosis or treatment and describing medical history or past and present symptoms, pain or sensations or the inceptions or general character of the source or external (206) source thereof insofar as reasonably pertinent to diagnose such treatment.

I find the statements to be reasonably pertinent.

Overruled.

Mr. Siracuse: I respectfully except. (End of side bar.)

By Mr. Chayt:

Q. I will read the question again.

"16. Q. What history, if any, did he give you pertaining to his condition at that time? A. He told me that he had been born in 1953; that on December 24, 1974 he was in good health, but then was struck by an automobile while on a sidewalk. He stated that he was rendered unconscious and was taken by ambulance to a nearby hospital, identified as Fordham Hospital. On his admission a rupture of the spleen was suspected, but the peritoneal tap was negative. He further told me that there had been found fractures of the sixth and seventh ribs on the left side and fractures of the transverse processes of the lumbar spine at the third and fourth lumbar vertebrae. He also suffered a contusion of the left foot. From the description given, I would believe this to be more accurately described as a (207) contusion and sprain of the left ankle as well as a contusion of the left foot. There also was noted an

abrasion of the axillar region. The patient further informed me that on January 8, 1975 he was transferred to the Trafalgar Hospital in New York City, where they found moderate spasm of the muscles of the spine with motion defects in all planes, although without neurological signs. The patient still suffered swelling in the left ankle at the lateral aspect, which appears to have been a strain of a ligament, and tenderness of the left chest. The patient was ordered to wear a physical restraint in the form of a corset, and remained in the corset substantially for a three-month period. He prolonged his stay in the United States while he continued to receive symptomatic medical care in New York. In April, 1975 he returned to Israel. where he continue to suffer complaints attributed to the injuries he sustained in the accident, for which he eventually consulted me.

"17. Q. Did you at that time ask this patient if he had any complaints? A. Yes.

"18. Q. Did the patient have complaints? A. Yes, he did.

(208) "19. Q. What, if any, were his complaints at that time? A. He complained of low back pains which caused him to be uncomfortable in his normal activities, and which caused him problems in his work. He had secured work as an airplane technician and found himself unable to perform his work due to severe pain which he experienced, making it impossible for him to work in a bent forward position. The pains, he stated, began in the morning, became greater during the day and were most severe when the patient had to work a lot or to stand for a period of time. When the pain became most severe, it would radiate to both buttocks and was responsible for hyperlordosis due to spasm. This means that his back would become distorted in position due to a stiffening or

htening of the muscles. He complained that he experiaced muscle spasm of the spinal region from time to time, which was not regular in nature. He stated that he would

experience it sometimes once or twice in the same day, and at other times as infrequently as once a week. At those times that he suffered from these spasms, he was unable to walk at all and the pain would last from several hours on some occasions to several days on (209) others. These back pains are the principal complaints of the patient. He still complains of tenderness of the left ankle and a mild instability of the left ankle from time to time, and tenderness of the left chest. These complaints, however, have not caused him to interrupt his normal life, in contrast to the difficulty he has experienced with his back."

Mr. Siracuse: Objection, your Honor.

The Court: On what ground?

Mr. Siracuse: On the ground that this is hearsay, especially when the doctor says that he was told the pain would radiate to the buttocks and was responsible for hyperlordosis due to spasm; I respectfully suggest that the patient did not tell that to the doctor.

The Court: Did you cross examine the doctor?

Mr. Siracuse: Cross examine, sir?

The Court: Yes. You had the right to.

Mr. Siracuse: Questions were submitted to the doctor.

The Court: Did he answer them?

Mr. Siracuse: Yes, sir.

The Court: I think we are going to have to leave it to the cross examination. I'm going to let the (210) answer stand.

Mr. Siracuse: I respectfully except.

By Mr. Chayt:

Q. "20. Q. Did you do a physical examination of the plaintiff? A. Yes, certainly.

"21. Q. If your answer to the previous question was yes, what were your findings on this examination? A. I

found that when standing the patient had a scoloiosis of the lumbar region to the left 20 degrees, predominant on the lumbar part of the spine. A scoliosis is an abnormal rotation and shift or deviation from the midline of the spinal vertebrae. There was marked spasm of the paravertebral muscles which I observed to be greater on the spine and greatest in the lumbar part of the spinal column. Such spasm was observable by me by touching the patient. This is objective and observable by the trained physician. I found motion of his spine to be very limited. Flexion was possibly only to 30 degrees. Extension was restricted to Zero. I observed that the patient then had to bend the knees and there was augmentation or increase of observable paravertebral spasm. "Paravertebral" refers to the (211) muscles on both sides of the spinal column. Lateral bending, which is from side to side, was possible to 30 degrees on the left and only 20 degrees on the right. Rotational movements of the spinal column were observed to be painful to the patient.

The patient was then made to lie down and the Lassogue test was given on both sides. This test consists of straight leg raising while the patient is on his back, one leg at a time. The straight leg raising could be performed up to 40 degrees on the left side and 60 degrees on the right There are no other pathological findings. Both legs were normally symmetrical with no length discrepancy. There were no objective neurological signs, and the reflexes, sensibility and muscle strength of the legs were normal. I found no objective evidence of injury at the time of my examination of either the left ankle or the chest.

"2. Q. Of what significance, if any, would be the finding of lumbar scoloisis in this patient?

of lumbar scoliosis in this patient? A. This is an abnormality which diminishes the ability of the spine to function as a support for the body and which limits movement of the trunk.

"23. Q. Of what significance, if any, would be (212) the finding of a spasm of the paravertebral muscles of the spine in this patient? A. Spasm is the stiffening of the muscles. It is an objective sign, and confirms pain. It is the body's way of reacting to pain in this area. It clearly indicates that the underlying condition still is active and causing pain as well as limiting function."

Mr. Siracuse: Your Honor, I would object to the next question and specifically the answer.

Mr. Chayt: 24, your Honor.

Mr. Siracuse: The first four words.

The Court: The basis for your objection, sir?

Mr. Siracuse: It is nebulous, sir.

The Court: Overruled.

By Mr. Chayt:

Q. "24. Q. What is the normal range of flexion of the spine? A. Depending upon the individual, normal lumbar flexion would be 40 degrees to 60 degrees.

"25. Q. What was your finding, if any, as to the maximum flexion of which this patient was capable? A. 30 degrees.

"26. Q. On non-medical terms, what is meant by (213) 'flexion of the spine'? A. Forward bending of the body.

"27. Q. In non-medical terms, what is meant by 'extension of the spine'? A. Backward bending of the body.

"28. Q. What is the normal range of extension of the spine? A. The lumbar spine, 20 degrees to 30 degrees before one loses equilibrium.

"29. Q. What, if any, are your findings as to the maximum extension of the spine of which this patient was

capable? A. Zero.

"30. Q. What clinical tests, if any, of this patient's back did you perform? A. Lassegue Test. I also observed his movements while standing and performed the standard neurological tests of sensitivity, motility and reflexes.

"31. Q. What were your findings of this test or these tests? A. The results were as I already have described.

"32. Q. Of what significance were your findings (214) as the result of clinical examination and testing? A. They confirmed the basis of his complaints and formed together with the X-ray results, the basis of my diagnosis.

"33. Q. What were your findings with respect to his chest? A. I found no objective signs with respect to the injuries to his chest when I performed my examination.

"34. Q. What were your findings with respect to his left ankle? A. Likewise with respect to his left ankle, at the time I examined it, it appeared normal.

"35. Q. What X-ray examination, if any, was done of this patient? A. On September 18, 1975 X-rays were taken

of the thoracal spine and of the lumbar spine.

"36. Q. Were these X-rays taken by you or under your supervision? A. They were taken at my request and in accordance with my instructions by Dr. Shahan, a radiologist who reported to me his findings, although I also examined the X-rays myself.

(215) "37. Q. In the course of your practice, do you have occasion to read and interpret X-rays? A. Often.

"38. Q. How long have you done this? A. Over ten years.

"39. Q. Approximately how many X-rays have you viewed and interpreted during just this past calendar year? A. At least a thousand, probably much more.

"40. Q. Please describe each X-ray film of this patient as to (1) the date taken, (2) the area examined and (3) the view or angle of exposure, designating each film at the outset of your description by a distinct number? A. All of these films were taken on September 18, 1975. Photographed onto the films in the usual manner are the name of the patient, the date taken and the name of the doctor by whom taken, in this case Dr. N. Shakin, X-ray Institute, Film #1 is an anterior-posterior view of the thoracal region. Film #2 is an anterior-posterior view of the lumbar spine and lower thoracal region. Film #3 is an oblique view from the left of the lumbar spine.

Film #4 is an oblique view from the right of the (216) lumbar spine. Film #5 is a lateral view of the lumbar spine.

"41. Q. If you have the X-ray films before you, identify each one by marking it with the number assigned by you in the previous answer? A. (Physically done by the witness, numbers 1 to 5 inclusive marked with a black marker pen).

"42. Q. Referring to each X-ray by the number you have assigned it, describe what each discloses to you with respect to the physical condition of this patient."

Mr. Chayt: As he mentions each X-ray, may we have the X-ray on the shadowbox.

The Court: Are the X-rays in evidence?

Mr. Chayt: Yes, your Honor. The Court: Very well, you may.

Q. I show you the five films in evidence, Doctor. Would you turn to Exhibit 3 first, which corresponds to Dr. Horoszowski's Film #1.

Doctor, would you give your answer in accordance with the X-ray that the doctor is referring to, in answer to Question 42, Film #1.

"A. Film #1 shows a distinct wedging compression (217) fracture of T-5 with also lesser wedging compression fracture of T-4 with deviation to the right but no rotation. With this view I am unable to observe any rib fractures."

Q. Would you now turn to B-1, Film #2, Doctor. Read the answer on Film #2, please. A. "Film #2—This view of the lumbar region shows a normal straight lumbar spine without scoliosis or rotation but showing the fractures of the left transverse processes L-3 and L-4, with pseudo-arthrosis (unconsolidated avulsion)."

Q. Would you now turn to Film 3, Doctor, which is B-5. A. "Film #3—View of the lumbar—left oblique, discloses spondylolysis left L-5 pedicle without listhesis."

Q. Would you go to Film #4* please. A. "View of the lumbar—right oblique. This view shows a normal lumbar spine. Comparing films #3 and #4 it is apparent that the patient did not have a constitutional deformity of L-5, since the abnormality which we see in film #3 but not in film #4 shows it is not bilateral. Therefore it is highly probable that the spondylolysis which we see in film #3 is due to trauma and would be compatible with the accident history given by the patient."

Q. Would you show that one? (218) A. That is very

hard to make out.

Q. You are pointing to which one specifically? A. #5. Actually it is pedicle of 5. It's in the back over here (indicating). "View of the lumbar right oblique. This view shows a normal lumbar spine. Comparing films #3 and #4 it is apparent that the patient did not have a constitutional deformity of L-5, since the abnormality which we see in film #3 but not in film #4 shows it is not bilateral. Therefore it is highly probable that the spondylolysis which we see in film #3 is due to trauma and would be compatible with the accident history given by the patient."

Q. The last film which he refers to as 5, read that, please. A. "Normal lumbar spine, lateral view with no Scheurman abnormalities in the L-5 region, showing the shadow of the lysis of L-5 previously described. Absence of Scheurman abnormalities serves to confirm trauma as its origin."

Q. May I digress, please. Doctor, is the absence of any findings on one view of the lumbar spine as distinguished from another view of the lumbar spine contradictory of findings on the first? A. I can't answer, myself.

Q. Would the fact that one view of the lumbar spine you can see fractures and another view you can't, could that (219) necessarily contradict each other? A. No.

Q. In what way? A. Certain views show fractures better than other views.

Q. So in fact it is a practice to take various views?

A. Correct.

Q. Go on reading, please. A. "43. Q. Assume that on December 24, 1974 the patient had been in good health, without limitation of any function or physical activity, having served in his country's army only a short time before without injury, and that on December 24, 1974 he was struck by a car and has no personal recollection of events thereafter until his arrival at a nearby hospital where he was taken by ambulance; that they X-rayed his chest and lumbar spinal region and there are stated findings in the hospital record of fractures of the transverse processes of vertebrae L-3 and L-4, indication of a fracture of the sixth or seventh rib, left side, findings of abrasions over the left thoraco-abdominal region and on the left flank, with complaints by the patient noted in the record of (220) pain in the left chest region and over part of the lumbar and thoracic spinal regions; and assuming further, that the patient suffered no further injuries at the time you had occasion to examine him, do you have an opinion with reasonable medical certainty as to whether the injuries sustained by this patient in the accident of December 24, 1974 would be a competent producing cause of the X-ray findings which you described in your previous answer? A. Yes, I have such an opinion.

"44. Q. If your answer to the previous question is in the affirmative, please state your opinion? A. My opinion would be that the described accident would cause the findings that I have described in my previous answers."

"45. Q. In your own words, doctor, what are the conditions you found which you would attribute to the accident to Mr. Harel on December 24, 1974?"

Mr. Siracuse: Your Honor, I object to the next. I do not see anything in the pretrial order—I'm sorry, the binf, or the contentions, I should say, of the plaintiff that indicate anything with respect to

a spondylolysis at L-5. If your Honor rules otherwise, I will stand corrected.

(221) The Court: I just see L-3 and 4 on page 2 of the pretrial order. I don't see anything about L-5.

Mr. Siracuse: Or any spondylolysis.

The Court: No. Unless counsel can show me it appears, I will sustain an objection. Do you wish to look at the pretrial order?

Mr. Chayt: I'm looking at mine, your Honor.

I found it finally.

The Court: Very well.

(Pause.)

Mr. Chayt: Your Honor, I omitted to mention it. In view of the fact that-

The Court: No, in view of the fact that his doctor has testified and left the stand, I am going to sustain the objection.

Mr. Chayt: I respectfully except. In light of his Honor's ruling, omit the following (indicating)

A. "The compression fractures of T-4 and T-5 which I mentioned before," or nonunion of the transverse processes on the left L-3 and L-4. In addition, there were the clinical findings.

"There were the clinical findings of soft tissue injury in these regions which are to be anticipated in the case of trauma of such severity as would cause these multiple (222) fractures and displacement. The effect upon the left paoasis muscle would account for the abdominal signs about which the hospital personnel apparently were so concerned when he first entered, even doing an abdominal tap.

"46. Q. From your professional experience, doctor, are these conditions a competent producing cause of pain?

A. They most certainly are.

"47. Q. Mechanically, in non-medical language, if possible, how would that occur? A. Pain is transmitted

through the nervous system. Extending from the brain, which perceives pain, are the nerves. The largest of these is the spinal cord. This patient sustained injuries in the vicinity of the spinal cord affecting the bone structure which is the spinal column, which protects the spinal cord. From the examination made as well as from his complaints, we can logically conclude that these injuries necessarily affected the soft tissue around the spinal column including the muscles and ligaments. The rigidity which this patient experiences is a reaction of the body. It is a natural attempt of the body to protect itself when (223) pressure on the nerves produces pain. Unfortunately, that very protective reaction which stiffens the area is productive of still more pain and further restricts the patient. It is a vicious cycle. Medical intervention seeks to lessen the pain, relieves the spasm and restore the function of the spinal region. However, we cannot cure the underlying condition. All we are able to do is to relieve the symptoms and minimize, as far as medical science is able, the pain which the patient experiences.

"48. Q. Do you have an opinion, with reasonable medical certainty, as to the physical effect upon this patient of the injuries or conditions which you have described? A. You ask if I have an opinion? Yes, I do.

"49. Q. What is your professional opinion? A. My opinion is that the injuries which this previously normal individual has suffered necessarily will restrict him in his activities at this time and the foreseeable future.

"50. Q. Do you have an opinion with reasonable medical certainty as to the effect of the condition or injuries which you have described on this patient's activities and occupation? (224) A. Yes, I do.

"51. Q. What is your opinion? A. My opinion is that this patient necessarily must be careful for the rest of his life, both with respect to his choice of occupation and any special activities, to avoid unusual stress and any

repeated strain on the spinal column, as these will eventually produce pain and disablement for recurrent periods of time.

"52. Q. Would further medical care for this patient be indicated as a result of his condition as found by you? A. I would say that further medical care is to be anticipated for the relief of symptoms that this patient can

be expected to suffer in the future.

"53. Q. Can the patient be completely cured with respect to his conditions resulting from this accident and his complaints, if any, if given any presently known medical care or treatment? A. Given the degree of pain and limitation of function observed in this patient and complained of by him at this time, the best that medicine can do is to advise him with respect to his activities and symptomatically relieve him whenever there is a (225) recurrence of pain with the onset of spasm and restriction. That whole cycle requires medication and rest for relief at those times."

Mr. Siracuse: If it please your Honor, I anticipate that Question 54 is going to be read and I respectfully request that your Honor read the answer. I object, sir. More particularly where it starts off with "It is impossible to say."

The Court: I think that sentence should be omit-

ted.

Mr. Siracuse: I respectfully suggest that the entire paragraph should be omitted.

The Court: All right.

Mr. Chayt: There is another phrase, your Honor, "a significant number."

The Court: Yes, I am studying that now.

(Pause.)

The Court: What about that?

Mr. Siracuse: I object to that, sir, since we are not concerned with a significant number. He

said it would be impossible to say with this patient, so I object to that. If he started off by saying he can't say, then the jury shouldn't be expected to guess.

The Court: If you can take the two sentences

together.

(226) Mr. Chayt: I don't know that they are neces-

sarily together, your Honor.

The Court: They are all part of one answer. I don't know that you can separate them out. I'm going to only permit the first sentence.

By Mr. Chayt:

Q. "54. Q. What future medical care, if any, would you anticipate that this patient will require? A. It is reasonably to be expected that he will from time to time require symptomatic treatment."

Mr. Chayt: There is an objection to the balance, I respectfully except to your Honor's ruling.

"55. Q. What, if anything, would you recommend that the patient do for himself with respect to those conditions you have found he has as a result of the automobile accident of December 24, 1974? A. The patient definitely should restrict his activities and avoid stress on the spine. Occupationally, he should change his occupation if possible, and find a type of work which avoids stress from standing and bending as well as one which would not require lifting of heavy objects. He also must keep his weight down because excess weight is an added (227) burden on a damaged spinal column which would tend to increase the frequency and severity of his periods of pain and disability.

"56. Q. Were the injuries which you find this patient suffered as a result of that accident a competent pro-

ducing cause of disability? A. Yes.

"57. Q. What would be the degree and duration of disability which you would attribute to the injuries sustained in the accident? A. Based on the history, I would say that there was a period of four months at 100%—"

Mr. Siracuse: I'm sorry. I respectfully object to these percentages, especially based on the last phrase, "under Israeli law," and so forth.

Mr. Chayt: I don't know whether that rules it

out.

The Court: I am not here to determine Israeli law.

Mr. Chayt: He is giving an interpretation of evaluation of disability, and he happened to throw in the phrase that he would if he was over there—

The Court: I'm sorry, counsel. I suggest you have a witness on the stand who can testify what his opinion (228) is and I am going to sustain the objection based on the fact that he was parsing out portions of that response. Sustained.

Mr. Chayt: Can we have it up to the word "par-

tial," your Honor?

The Court: Partial disability, yes.

Q. Would you give the answer? A. "Based on the history, I would say that there was a period of four months at 100% permanent partial invalidity or disability. From approximately April 1, 1975, I would calculate the disability to be"—

Mr. Siracuse: Your Honor, these percentages are all based upon that.

The Court: No, I don't find it to be so.

A. "-to be 50 percent partial."

Mr. Chayt: I respectfully except to the balanced being deleted, your Honor.

The Court: I am permitting you to continue up to the word "disability" if you wish.

A. "Subsequent to my seeing the patient the patient from approximately October 1, 1975, my estimate of his permanent partial disability"—

The Court: No, you can't. Strike that. The jurors will disregard what the doctor had said. I thought I (229) could make a coherent sentence of it; I cannot. The jury will disregard what the witness said after "subsequent."

Q. "58. Q. Do you have an opinion with reasonable medical certainty as to the prognosis or future of this patient? A. With care on the part of the patient, proper diet to reduce his weight, it is possible that the condition will become asymptomatic. However, in view of the prolonged period that the patient has continued to suffer complaints and the nature of the injuries which he suffered, it is far more likely that those are permanent conditions with which he will have to learn to live and to which he must adjust.

"59. Q. Doctor, do you have an opinion with reasonable medical certainty as to whether the injuries which the patient suffered in the auto accident would be expected to affect adversely his life expectancy? A. Yes, I could say I have an opinion.

"60. Q. What is your opinion? A. I would not foresee any effect on his life expectancy unless there were further injury to those areas.

(230) "61. Q. Doctor, assuming this patient was 21 years of age at the time he was injured on December 24, 1974, and now demonstrates the findings and conditions you have previously described, what effect, if any, would you anticipate the normal aging process would have upon the residuals of his injuries, particularly with respect to the spinal column? A. Particularly as he gets older, it is reasonable to anticipate that he will have more problems with the vertebrae injured as a result of this accident than he otherwise would, and arthritic complications in

these areas are reasonable to expect as he gets older. Most people over 40 years of age start to develop arthritis which fortunately is asymptomatic. However we see a greater proportion of symptomatology and complaints to damaged areas such as those vertebrae of the spine which this patient has damaged, as the patient ages.

"62. Q. Do you have any intention of going to the United States? A. While I would like to, I have no such

plans at this time."

Mr. Chayt: I am going to omit cross-examination by my colleague and let him ask them if he wants to.

- (231) A. "Film #4-View of the lumbar-right oblique.
- (232) Mr. Siracuse: Your Honor, do I get to ask them now or wait until later?

Mr. Chayt: If you are going to do it now, you may.

The Court: Do you have any objection to his doing it now?

Mr. Chayt: No, your Honor.

The Court: Very well. We are now going to proceed to the cross-examination.

Mr. Siracuse: May we proceed in the same manner, if your Honor please.

The Court: Yes.

By Mr. Siracuse:

(Cross Examination of Dr. Horeszowski)

"1. Q. When did you see Ytzhak Harel for the first

time professionally? A. September 17, 1975.

"2. Q. On your initial examination of Ytzhak Harel, please give the results of findings as to: (a) weight and height. A. Not taken.

Q. (b) as to gait? A. Normal.

Q. (c) as to head? (233) A. Normal.

"Q. (d) as to eyes? A. Normal.

"Q. (e) tongue? A. Normal.

"Q. (f) Romberg test? A. Normal.

"Q. (g) neck? A. Normal.

"Q. (h) Upper extremities: motions, reflexes, motor and

sensory findings, grasp? A. Normal.

"Q. (i) As to the back: motions, musculature? A. Strong musculature bilateral spasm, greater on the left, limitations of movement which were described in the previous answers.

"Q. (j) Chest? A. Normal.

"Q. (k) Lower extremities: motions, length? A. Examined; limited straight leg raising as previously described; length equal.

"Q. (1) Ankles: motions, contour? A. Normal.

"Q. (m) Neurological examination of lower (234) extremities? A. This was done and found normal. Lassegue is not a neurological test.

"3. Q. Did you take any X-rays! A. I personally, no; but X-rays ordered by me were taken for me and personally reviewed by me as I have previously described.

"4(a) Q. Was there any course of treatment recommended? A. Yes.

"4(b) Q. If so, describe? A. Medical treatment: pills to reduce spasm; corset to be used when necessary, particularly during periods of stress to the spine. Physiotherapy.

"5(a) Q. On how many occasions did you treat Ytzhak

Harel? A. Twice.

"5(b) Q. Give each date? A. September 17, 1975 and

October 6, 1975.

"6. Q. What was the patient's progress in relation to any complaints given to you on any area in question No. 21 A. There appeared to be no progress by October 6th and the patient did not return for the recommended (235) P. T.—physiotherapy.

"7. Q. Please attach copies of all your records on Ytzhal Harel."

Mr. Siracuse: That is the end of it, sir. That is dated at the same time, counsel.

Mr. Chayt: Yes. The questions were all asked at the same time.

Mr. Siracuse: Thank you, your Honor, for the opportunity.

By Mr. Chayt (Cont'd):

Q. Doctor, I ask you to assume that this 21-year-old previously healthy male on December 24, 1974 was on a sidewalk struck by a car. Then he was found lying on his back by the police officer who thereafter responded when he arrived at the scene, and he did not respond to questions put to him by the police officer at the time he was there; that the patient is unable to recall either being hit by a car or truck, having no recollection of events after that until he was in the ambulance going to the hospital, and thereafter showing irritability towards the hospital personnel at times, with headaches continuing into the following summer.

Do you have an opinion with reasonable medical certainty as to whether this young man sustained a head injury! (236) A. Yes.

Q. What is your opinion? A. I believe that the patient sustained a head injury.

Mr. Chayt: If your Honor please, I had a fact in that that hadn't been read but which is part of the record. It is part of the Fordham Hospital record—the Trafalgar record. Date of accident, 12/24/74. Fordham Road, Bronx, patient walking on sidewalk was hit by a vehicle. Patient doesn't remember if it is a car or a truck.

Q. Doctor, if a patient suffering from cerebral concussion following an accident—may I have the answer read back?

The Court: He is withdrawing the question and wants the answer read back.

(Record read.)

Q. Doctor, would you tell us your diagnosis with respect to that head injury. A. The patient sustained a cerebral concussion. That is my diagnosis.

Q. Doctor, would a cerebral concussion be a competent producing cause of personality effects such as irritability dwelling in a patient?

Mr. Siracuse: I have to object to the form (237) of the question and to the question itself. There is no claim in this case about any change in personality.

The Court: Let us see that, counselor, in the pretrial order. Change of personality, please, counsel. Let's stick to what you put down.

Are you withdrawing your question?

Mr. Chayt: Yes, I withdraw it in that form, your Honor.

· The Court: Proceed.

Q. Doctor, with respect to the entry in the nurses' notes with respect to behavior of the patient in regard to medication, do you have an opinion with reasonable medical certainty as to whether the cerebral concussion which you have diagnosed this patient as having, would that have any relation to that behavior?

Mr. Siracuse: I object to the form of the question, your Honor.

(Question read.)

The Court: Answer yes or no, doctor.

A. Yes.

Q. Is your opinion that it is related or not, doctor? A. Yes.

Q. Will you refer to the areas that Dr. Horoszowski has mentioned the compression to exist, are these weight(238) bearing areas of the spine? A. Yes.

Mr. Siracuse: Object to the form of the question. What areas?

The Court: Objection to form sustained.

Q. Doctor, when Dr. Horoszowski described the condition in the thoracic region where the spinal column was deviated, he mentioned T-4 and T-5. Are those portions weight-bearing portions of the spinal column? A. Yes.

Q. Doctor, would the condition of these vertebrae as they appear on these X-rays, on that particular X-ray that shows the thoracic region—

Mr. Siracuse: Objection, your Honor. This doctor never testified to this. He only read answers from another doctor. There has been no examination of this doctor as far as X-rays are concerned.

Mr. Chayt: If your Henor please, it can refer to a report which is in the record.

The Court: There is evidence in the record, if he wants to question him in a proper manner. Rephrase the question, counsel.

Q. Doctor, would the condition of the thoracic vertebrae as they appear in X-rays identified as B-3, would that (239) be a competent producing cause of limitation of function of the spine?

Mr. Siracuse: I object to the form of the question, your Honor.

The Court: If you know, doctor.

A. Yes.

Q. Would the condition which this patient has in that region be a competent producing cause of pain? A. Yes. Talking about the thoracic region?

Q. Yes. A. Yes.

Q. Would this condition that he has in the thoracic region be a competent producing cause of disability from time to time in this patient? A. Yes.

Q. What can the medical profession do for him? A.

Nothing.

Q. Can they do anything symptomatically to relieve the symptoms? A. Yes.

Q. Can they cure the condition? A. No.

Q. Let's go on to the transverse processes of the lumbar region, L-3 and L-4. Are these just linear fractures, (240) these transverse processes? A. No, these are complete evulsions, sir.

Q. What do you mean by that? A. The transverse processes have fragmented and are separated. The frag-

ments are separated by distance.

Q. Are these transverse processes of the spinal region part of the weight-bearing structure of the spinal column? A. Yes.

Q. Would you tell us, doctor, in what way they affect or are affected by the weight bearing of Mr. Harel as he stands erect? A. In two ways. One, they are buttresses of the spinal column, which is the primary supporting structure, and attached to that spinal column. Two, they are pulled on by the muscles which surround the spinal column, so any way the spinal column moves will have a tendency to move these fragments and cause pain.

Q. To what are these ligaments and tendons and muscles attached? A. They are attached to muscle.

Q. What are they attached to in terms of bone structure? A. The parts that broke off are still attached to (241) the original muscles and tendons they are attached to, but they are no longer in the same position.

Q. Are they furnishing any support to these muscles and tendons and ligaments in this region? A. The frag-

ments are not but the other part is.

Q. To the extent that the fragments are broken off, would this affect his movement and ability and function of

that part of his back? A. Yes, I would think so.

Q. With respect to the severity of this impact, what would that signify to you, the fact that these two transverse processes are not only fractured through but broken off and evulsed with respect to the underlying and surrounding soft tissue in that area?

> Mr. Siracuse: I object to the form of the question, sir.

The Court: Sustained.

Q. Do you have an opinion with reasonable medical certainty as to the condition or effect upon the surrounding soft tissue where the trauma was such as to break off the portions of the spinal column, the transverse processes and evulse them to the point where we see them in the X-ray? A. In my opinion the trauma was brought about to produce these effects and there would be great disturbance (242) of the underlying soft tissue.

Q. Would that be a competent producing cause of the

present disability in this patient? A. Yes.

Q. When he complains that he is unable to perform his function on his job and military service without pain, do you have an opinion with resonable medical certainty as to whether this trauma and this accident would be a competent producing cause of this complaint? A. Yes, I believe as described those are the pains that he is experiencing.

O. Do you have an opinion with a reasonable medical certainty yourself as to whether when this young man grows older, as to his life span, whatever that might be, what is the significance of his having had this injury to him at age 21? A. I would have to answer that at

length.

Q. Try to be as succinct as possible, but to the extent that you have to take time, please do. A. The patient is now in an abnormal weight-bearing position. Because of his pain he may precipitate further arthritic changes in his spine that a normal person wouldn't who stands straight and has not got these problems.

Q. Do you know of a Samuel Cohen who testified here (243) in connection with this case? A. I know him pro-

fessionally, sir.

Q. What is his field? A. He is an orthopedic surgeon.

Q. Is he a qualified radiologist, to your knowledge?

A. He is an orthopedic surgeon, sir, to my knowledge.

Q. Doctor, you examined this patient yourself, did you

not? A. Yes, sir.

Q. Doctor, when he came to you what was he referred to you for! A. Headaches and neurological evaluation.

Q. What did you find, any positive findings? A. Just one positive finding.

Q. What was that, sir? A. I found photophobia.

Q. What is that, sir? There has been no complaint as to photophobia.

The Court: I think you have done it again, counsel. Work you refer to the pretrial order and tell us you have included photophobia in there. I may have missed it. I don't see it.

Mr. Chayt: If your Honor please, it goes within the diagnosis-

(244) The Court: Of?

Mr. Chayt: Concussion. If I may ask the doctor that.

The Court: First ask him; I would suggest that you do show in here that there was a "cerebral concussion." That is one of your contentions. Therefore I'd allow it without commenting further. It is not my intention to comment.

Q. Is photophobia a diagnosis or symptom? A. It is a symptom, sir.

Q. In this case what was it a symptom of? A. It was a symptom of cerebral concussion, cerebral irritability.

Q. Would you kindly explain to the jury what you mean by cerebral irritability as manifested by this word photophobia? A. Following a concussion or trauma to the brain, the brain has a tendency to manifest irritability a various forms. The irritability can be manifest through personality changes, the irritability can be manifest through actual problems with hearing noises and being upset by them or pulling back from a light, bright lights might bother you.

Mr. Siracuse: Your Honor, there has been no

complaint of any of these symptoms, sir.

(245) The Court: He's testified to it now. The jury has heard it. I'm going to allow you latitude on cross-examination. I'm going to leave it to the jury in the final analysis, but permit you the latitude in cross-examination. They have heard it and I'm going to let it stand.

Q. Knowing what you do about Mr. Harel's physical condition, from your own examination, from hospital records, from what's in evidence here today, do you have an opinion with reasonable medical certainty as to his future indulging in sports activities which he has testified he previously enjoyed, such as soccer, bowling? A. Yes.

Q. What is your opinion? A. That he would have to desist from contact sports and heavy lifting and physical

turns of the body because of his condition.

Mr. Siracuse: Objection.

The Court: That is his opinion. I will let it stand.

Q. Doctor, with reasonable medical certainty can you give us any recommendation as to Mr. Harel's future occupational activity in light of his spinal condition since this accident?

Mr. Siracuse: Objection.

(246) The Court: Sustained.
Mr. Chayt: I have no further questions on direct,

Mr. Chayt: I have no further questions on direct, your Honor.

Cross Examination by Mr. Siracuse:

Q. Doctor, you rendered a report with respect to your examination of Mr. Harel, am I correct, sir? A. Yes.

Q. And actually, you examined him on only one occasion, am I correct about that? A. I physically examined him one time.

Q. That is what I meant, sir. A. Yes, sir.

Q. And the other occasion when he came to you or to your facility— A. Laboratory.

Q. —was where you performed a brain scan; isn't that

right, sir? A. That's correct, sir.

Q. What is the purpose of a brain scan, sir? A. To look for residuals of trauma such as subdural hematoma which would have something to do with the patient's symptoms.

Q. Does it give you any other information other (247) than diagnosing Mr. Harel's subdural hematoma? A. It

gives you information about the brain.

Q. What was the result of the brain scan? A. It was a normal brain scan.

Q. You said you found a photophobia? A. Yes, sir. Q. Did you include that in your report, sir? A. Not

on my typewritten report, which I typed myself.

Q. You didn't include photophobia in your typewritten

report? A. No, sir. It's only on my notes.

Q. When are those prepared, sir? A. The day the patient saw me. It's in my handwriting.

Q. You typed this report yourself? A. Yes, sir.

Q. Did you type this report from your notes, sir? A. Yes.

Q. Was there any particular reason why you left out

photophobia? A. No. I just failed to list it.

Q. Would you say that this report you rendered, sir, showed as far as you were concerned a completely normal (248) individual? A. The neurological examination?

Q. That is right, sir. A. The neurological and the brain scan were normal at the time I examined him.

Q. You can only tell us what you found at the time you examined him, is that right? A. Neurological examination.

Mr. Chayt: Objection, your Honor. That is argumentative.

The Court: Yes, it is argumentative.

Q. And whatever your examination showed, you can only then tell us what his condition was as of the time of your examination; am I correct? A. Correct, sir.

Q. So that as of the time of your examination you

did all the neurological tests? A. Yes, sir.

Q. That one would usually do, right? A. Yes, sir.

Q. Would you tell us what those tests are. A. I examined the mental status, cranial nerves, motor and sensory function, deep tendon reflexes. I looked for the pathologial reflexes, and I came to a conclusion.

(249) Q. And your conclusion was as you have just told us, a completely based on that examination— A.

Normal neurological examination.

Q. A normal person neurologically? A. Yes.

Q. Did you know that he had some other complaints in addition to neurological complaints? A. The only complaint he made to me was headache, sir. And I knew he had other complaints for which he did not consult me.

Q. You say he complained to you of headaches, sir?

A. Yes. And photophobia.

Q. And Photophobia? A. And photophobia.

Q. What was that? How did he do that? A. He said "Lights bother my eyes."

Q. But you don't have that in this report. A. I have it in my notes.

Q. No, on this one. This is a report that you sent to

Dr. Zaretsky? A. That's right.

- Q. Dr. Zaretsky sent this gentleman to you because he wanted an expert's opinion on this gentleman's neurological status as far as his brain was concerned and any possible (250) head injuries; is that correct, sir? A. Yes, sir.
- Q. Did you find any objective evidence on head injury? A. No objective evidence at the time.
- Q. Do you see anything in any of the hospital records that indicates any objective signs of head injury? A. Yes, sir.
 - Q. Where? A. Headache, headache, headache.
 - Q. No, objective signs. You know-withdrawn.

The Court: Don't argue with the witness.

Q. Is a headache an objective sign, sir? A. No, headache is a subjective sign.

Q. I ask you, was there anything in any of the hospital records from an objective point of view that showed any injury to this gentleman's head, either Trafalgar or Fordham? A. Yes. Irritability.

Q. Is irritability subjective or objective? A. I think it is both. It is objective to the examiner that a patient

is irritable.

Q. All right, sir. How about any signs of any bruises, contusions or any marks of any type on any part of (251) this gentleman's head? A. I did not find any, sir.

Q. Mr. Chayt asked you whether you were familiar

with Dr. Cohen? A. Yes, sir.

Q. And your familiarity with Dr. Cohen, you said, was from a professional point of view; is that right? A. Yes, sir.

Q. You know Dr. Cohen to be an outstanding orthopedic surgeon, do you not, sir?

Mr. Chayt: I think this may be an awkward thing to put to the witness. I don't know the relevancy. The Court: Let us see what he knows.

A. I don't know.

The Court: Ladies and gentlemen, I want to caution you that questions are not evidence. The answers or lack of answers are what counts.

Q. What is your affiliation or knowledge of him from a professional point of view, sir? A. I have seen his name in relation to orthopedic examinations of a number of patients that I have personally examined neurologically. That is my entire knowledge and affiliation with him.

Q. Do you know that he is a diplomate in orthopedics? (252) A. Most orthopedists are.

Q. Do you know that he is? A. No, I didn't.

Q. You were asked by Mr. Chayt whether Dr. Cohen was a qualified radiologist, do you remember, and you said, sir, he is an orthopedist? A. He is not a qualified radiologist to my knowledge, sir. That is what I answered.

Q. When you say he is not a qualified radiologist, are you intending to tell us and this jury and this Court that Dr. Cohen is not qualified to read X-rays?

Mr. Chayt: If your Honor please, I object to that. He answered the question.

The Court: It is argumentative. You can rephrase it. I will let you inquire.

Q. Do you know that Dr. Cohen cannot read X-rays? A. I have no idea what Dr. Cohen can or can't read.

Q. Sir, an orthopeoic surgeon, is his job necessarily that kind of work that would require him to be knowledgeable as far as the reading of X-rays is concerned?

Mr. Chayt: I object to this as speculative.

The Court: Yes. You don't know Dr. Cohen personally; is that correct?

The Witness: No, sir.

(253) The Court: You don't know his capacity or capability, do you?

The Witness: No, sir.

Mr. Siracuse: If your Honor please, I am not asking about Dr. Cohen per se, I am asking about orthopedic surgeons.

The Court: Generally? Mr. Siracuse: Yes, sir.

The Court: What is the relevance of that?

Mr. Siracuse: Because of the question and an-

swer given before-

The Court: All right. It is cross-examination. Give your question. It is up to the jury to determine the credibility of the testimony and weight the jury will give to this witness.

Q. Did you intend by answering that way, intend to say that Dr. Cohen was unqualified to read X-rays? A. No, sir. I intended to say that he is not a listed radiologist, and that is the question asked of me by the attorney, period.

Q. Dr. Horoszowski is a qualified radiologist, sir? A. No, sir, he is not. He is a qualified orthopedist in Israel.

Q. If Dr. Horoszowski got a report with respect to (254) X-rays from a radiologist, would be interested in seeing what that report said? A. Certainly.

Q. Did you in reading or in conversing with this attorney, did you find out what the report of Dr. Horoszowski—and please correct me if I am wrong—did you notice that Dr. Horoszowski said some radiologist took X-rays and it was these X-rays he was telling us about? A. Yes.

Q. And did you notice whether he said a radiologist reported on these X-rays? A. Yes, sir.

Q. Was that report ever presented to you? A. No, sir. I just read what I was told to read.

Q. Would you be interested in seeing that report, sir?

A. No, sir.

Q. Not at all? A. No, sir. I am not an orthopedist. That is who would be interested in seeing it.

Q. You are what, sir? A. An orthopedist would be interested in seeing those particular films and reports.

Q. Are you saying, sir, that you don't feel that you (255) are as qualified as Dr. Cohen as far as reading X-rays is concerned? A. That is correct, sir.

Q. When Dr. Cohen said that the scoliosis as far as the thoracic area of the spine preexisted the accident that this gentleman had by some several years, possibly back to the time he was 16 years of age, and that there was a congenital thing that was there, would you agree with Dr. Cohen?

Mr. Chayt: Objection, your Honor.

The Court: State your reason, please, counsel. Mr. Chayt: If your Honor please, he is in effect asking this witness to form an opinion based on the opinion of another doctor, not on his own knowledge.

The Court: I will sustain your objection to the form of the question. I think you can get at the

subject matter a trifle differently.

Q. Would you bow to Dr. Cohen's opinion with respect to the preexistence of that scoliosis?

Mr. Chayt: Objection again.

The Court: Sustained as to form.

Q. Would Dr. Cohen be more qualified than you to tell us the etiology of that scoliosis? A. I never told you the etiology of the scoliosis, (256) sir. I read another man's report. I wondered why you asked me.

Mr. Chayt: That was my objection earlier, sir. Counsel has been asking questions of this witness as though he testified that way.

The Court: Now he's answered the question and

you have the answer.

Q. So, you take no position whatsoever as far as the reading of these X-rays is concerned and as far as telling this jury anything about what your diagnosis might be based upon the reading of those X-rays; is that correct? A. No, sir, I disagree with you. I do take a position about the results of the X-rays and reports that I have read and heard and have rendered my personal opinion.

Q. Did you just tell us what you— A. Not about an X-ray reading about mobility, function and things of that sort. I rendered no opinion about whether the patient did or didn't have a T-4 scollosis and what the cause of it was. I answered as to what effect that would have as to the patient's positioning and movement of his body. And looking at those X-rays I can tell you what is going

to happen to that patient.

Q. Can you tell us whether there was scoliosis? A.

(257) Q. And whether that preexisted the accident or didn't? A. No, sir. I can't tell you that because I am not qualified to tell you that.

Q. Neural watch was where he said they performed

certain tests? A. Yes. sir.

Q. To keep this person under— A. Observation. Careful observation. Written observation.

Q. This is good medical practice, you would do it in most cases of this kind, is that right? A. I would do it only in cases of head injury. I would not do a neural watch for a patient that was bitten by a dog on the foot.

Q. Where in this hospital record do you see anything that indicates that this man suffered a head injury?

Please listen to my question. I am talking about objectively, wherein they say he struck his head. A. I saw nothing in the history of the doctors that I read about where this patient struck himself or any history of unconsciousness. But I do find a history of a neurological watch.

Q. You also found that the initial history was that (258) there was no loss of consciousness, am I correct about that? A. No, sir. History or was there in fact?

Q. I asked you about the history. A. The history as taken by another physician which I read makes no mention of his finding of a history of unconsciousness.

Q. You say there is nothing in there that indicates that—in the history that there was no loss of consciousness? Maybe I am confused, doctor.

Mr. Chayt: I don't understand the question, in light of the previous answer.

The Court: Could you point to anything in any of the records before you which states that the plaintiff here suffered a loss of consciousness at any point in time?

The Witness: Yes. I have two sets of records—three sets. My own, Dr. Horoszowski's record and the record at Trafalgar Hospital that states he was unconscious.

The Court: Are these all what the patient told various people?

The Witness: Yes, sir.

Mr. Siracuse: If your Honor please, my question is to the neuro-watch in the Fordham Hospital, sir. The Court: Ask the question.

Q. Do you say that in Fordham Hospital there is (259) no notation that he did not suffer from loss of consciousness, sir? A. It is a negative question. Did not suffer or did suffer? There is no notation of loss of consciousness according to the resident's admitting history.

Q. Do you have it, sir?

The Court: He has answered your question.
Mr. Siracuse: I think he is in error, sir.
Mr. Chayt: He said there was no notation.
The Court: Read the answer back.

(Record read.)

Q. Is there a notation that there was no loss of consciousness? A. I did not read the records in their entirety. I cannot tell you what is not there.

The Court: No, is there a notation written down in the Fordham Hospital record in words or substance, "There was no loss of consciousness"?

The Witness: To the best of my knowledge, having seen these records for the first time today, sir, there is no mention that he wasn't unconscious. There is no mention whatsoever about his state of consciousness.

Q. This was read to you earlier by Mr. Chayt and I am referring Mr. Chayt to what you have noted as page 6— (260) may I approach the witness, sir— A. Yes. The second resident's history. You are right. There is a record that the second resident said that there was no loss of consciousness. Thank you. I am reminded. Not the first page. But that is a negative.

Mr. Siracuse: Your Honor, may this be stricken, please.

The Court: Yes. "But that is a negative" may be stricken. The jury will disregard it.

Q. Someone who can't bend backwards at all and has a zero— A. Hyperextensor.

Q. And someone who is as limited in his motion as Dr. Horoszowski says he is, sir, can he perform as an aircraft mechanic who has to crawl through spaces and lift objects? A. His limitation is pain, sir. It is the pain that prevents him from doing things.

Q. Exactly, but he can move, is that correct? A. No, it said he can't hyperextend. That is not a normal movement. That is a physical examination movement.

Q. If the doctor says it is zero, what does that mean? A. It means in the artificial situation in the (261) doctor's office when the doctor attempts to bend the patient backwards in a nonphysiological sense the patient has pain and he cannot bend backwards. He prevented the examiner from moving him by showing pains and spasm. It doesn't mean he can't bend. He doesn't bend backwards like that.

Mr. Chayt: Would the record note that the witness stood erect and bent his head backwards—

The Witness: Head and spine backwards. And it burt too.

Q. Doctor, when Dr. Horoszowski said it was zero, that he couldn't move at all, are you saying that he could move but it would be with pain?

Mr. Chayt: Objection, your Honor. The question is improper. He said he couldn't hyperextend beyond zero.

The Court: Ask the question differently.

Q. Do you say that when Dr. Horoszowski or any doctor says that a patient cannot hyperextend any amount, that is, he would give it a zero, does it mean that the patient can't hyperextend at all or that the patient can't hyperextend without feeling pain? A. The patient cannot hyperextend at all. But there may be reasons for it.

Mr. Siracuse: Your Honor, may we have the (262) gratuitous remark stricken?

The Court: The response is the first part, "The patient cannot hyperextend at all." The remainder will be stricken.

If counsel wishes on redirect to inquire as to reasons, he may do so.

Q. What is lumbar flexion, doctor? A. Bending of the

spine forward on the pelvis.

Q. If someone who bends the spine forward only 30 degrees rather than the minimum of 40 and the maximum of 60, would he be capable of performing a job as an aircraft mechanic, crawling into narrow spaces and lifting heavy objects? A. I'm sorry, I have no personal experience of the size of Israeli aircraft. It's secret.

Q. I said narrow spaces, doctor. A. I don't know what narrow spaces are. Are you trying to ask me how far a patient would have to bend to work in an Israeli airplane? I can't tell you. He could bend 30 degrees, ac-

cording to Dr. Horoszowski.

Q. What does the word extension mean, doctor? A. What I demonstrated before.

Q. I'm sorry. We already said so. Doctor, would physiotherapy help the patient? A. When he is in pain,

yes.

- (263) Q. If a patient was asked to come back for physiotherapy in January—in October, 1975 and never came back for any physiotherapy, would you consider that he is not in pain? A. No, sir. I would consider that he did not come back for physiotherapy. I don't know the reason. I can't draw that conclusion. I don't think you can either.
- Q. Did Dr. Horoszowski treat this patient at all on the two occasions that he saw him, sir? A. I'm not quite clear about that myself. He only saw him twice and prescribed treatment for him. I would assume that the patient did not come for the treatment.

Q. Would you suggest, then, that all Dr. Horoszowski did on the occasion of those two visits was to examine

him, sir?

Mr. Chayt: If your Honor please, the record speaks for itself. This witness knows nothing more than was read in the deposition.

The Court: Sustained.

Q. Does what you read in that deposition indicate anything more than just an examination? A. That is the preliminary to treatment. It does not say anything about treatment. I am quoting the record.

Q. Doctor, did you read this report by Dr. (264) Horoszowski where he said he found no X-ray evidence of rib fracture? A. What I read was that on the view that he had, he could not determine if there was a rib fracture. It was not a view for ribs, it was a view for spine.

Q. It was a view of the thoracic area, wasn't it? A. No. It was a view of the thoracic spine, which burns out the ribs—burns means it uses so much strength in order to make the picture that all of the soft tissue and small bones are not seen, just so that the major bones, the thoracic bones are seen in the picture. So he could not comment on that.

Q. Is there any evidence that he was asked to have the spine X-rayed, sir? A. Sir, you read the report as I did.

Q. Did you notice whether he had any X-rays of the ribs taken? A. I recall that he ordered to have somebody do the X-rays and we have the X-rays here and they do not include X-rays of the spine—of the ribs.

Q. Dr. Zaretsky is an orthopedic surgeon, isn't he? A. Yes, he is.

Q. Did you talk to Dr. Zaretsky about this accident?
A. Yes, sir.

(265) Q. Did you ever get a report from Dr. Zaretsky about this accident? A. No, sir. I am not the one that sent the report to him.

Q. Did you discuss his orthopedic situation along with the neurological A. No, sir. I discussed the neurological situation with Dr. Zaretsky.

Colloquy

Mr. Siracuse: Your Honor, I would like a ruling from the Court with respect to what extent I can go as far as Dr. Zaretsky's report is concerned.

The Court: Is it in evidence?

Mr. Siracuse: No. sir.

The Court: Then how can you?

Mr. Siracuse: It was just discussed.

The Court: You could have subpoenaed the doctor. If he knows nothing about it-

Mr. Siracuse: I guess I could have subpoenaed him, yes.

The Court: Very well. Is there anything further?

Q. Do you know how many times this patient saw Dr. Zaretsky? A. Sir, I know nothing about this patient's (266) relationship with Dr. Zaretsky, except that Dr. Zaretsky sent him to me for neurological examination and consultation.

Q. Would Dr. Zaretsky be more qualified than you as far as this gentleman's orthopedic situation is concerned? A. Yes, sir.

Mr. Siracuse: Thank you. The Court: Any re-direct?

Mr. Chayt: I appreciate the indulgence the Court has given both counsel with respect to the conclusion of this witness. I have no questions at this time.

The Court: Thank you very much, doctor.

(Witness excused.)

The Court: Mr. Chayt, we are on the plaintiff's case—Mr. Chayt: I would like to state with respect to Dr. Zaretsky—

Mr. Siracuse: I object, your Honor.

The Court: No, you don't have to state anything about Dr. Zaretsky.

Colloguy

Mr. Chayt: He was unavailable today voluntarily other than by subpoena. He was available Friday afternoon only voluntarily. Subpoena, yes, we both have the power to subpoena him.

The Court: That is not construed against either (267)

one. Anything else!

Mr. Chayt: I have the deposition of the defendant. Did you want to go on after lunch, your Honor?

The Court: How long is that? Mr. Chayt: Not long, your Honor.

The Court: Why don't we proceed—no, the jury has sat long enough. I think I ought to give them their luncheon recess at this time.

Ladies and gentlemen, we will resume at twenty past two. Please don't discuss the case amongst yourselves, keep an open mind on all facets of the case until the case has been concluded and given to you following my charge. It is my estimation based on my prior discussions with counsel that the evidence in the case will be completed shortly after we resume; is that correct?

Mr. Chayt: Yes, your Honor.

The Court: We will then proceed to the summations and I will charge you.

(325)

Charge of Court.

(342) There is evidence which shows that the plaintiff was visiting the United States and as not employed at the time of the accident. There is other evidence that he was a dental technician. I will leave it to your recollection of the evidence what he was doing at the time of the accident.

There is further evidence that he had been discharged from the Israeli Army and was visiting here as a tourist. In this case he was due to return when his visa expired on January 25, 1975. But, according to the plaintiff, due to his physical injuries he continued under medical care of physicians treating him here, and it was not until April 24, 1975 that he returned to his own country.

Any award you make for diminution of plaintiff's earning capacity by reason of his injuries which were due to the accident should be determined on your finding as to the comparative condition of his health before and after the accident, his prospects for advancement and the probability (343) with respect to his future earnings prior to his injuries, the extent to which you find that those prospects or probabilities have diminished by the injuries, or the length of time that you find plaintiff would reasonably be expected to work had he not been injured, the nature and hazards of the plaintiff's employment and any other circumstances which would tend to increase or decrease plaintiff's earning capacity.

In this connection it is pointed out once again that Mr. Harel would now be twenty-three years of age and has a life expectancy as indicated above, which I have said probably to be 47.8 years, and what is called a work expectancy, according to the same type of tables, of 40.8 years.

Requests to Charge and Exceptions

As I stated with respect to life expectancy, such tables regarding both life and work expectancy are nothing more than statistical averages. They neither assure that Mr. Harel will have the span of working life I have given, nor assure that his working span will not be greater. The figures that I have given you are not binding upon you but may be considered by you together with your own experience and the evidence you have heard in determining what plaintiff's work expectancy is.

(346) Mr. Chayt: Yes, your Honor. Again I except to the Court charging the substance of No. 2 of the defendant's request, specifically we find the reason for the defendant losing control of his car was that the accelerator jammed and that the jumping was not due to the defendant's failure to exercise reasonable care, then you are entitled to find that the defendant was not negligent. My exception to that portion is that it does no include, and specifically by omission, excludes the failure of the defendant to use any other mechanism or control of his vehicle or warning. In other words, it simply says if there is a jam of the accelerator they are entitled to find that he was not negligent. By saving you may consider it with all of the other evidence is one thing, but if you just say they are entitled to find that. I think it is unfair to the plaintiff.

The Court: You have that exception. Any others?

Mr. Chayt: No, your Honor. The Court: Any exceptions?

Mr. Siracuse: Just one. I respectfully except to that portion of your Honor's charge where you advise this jury that they have a right to consider any diminution of earning capacity. There has been an absolute absence of any proof of earnings; they have no dollar value by which they can gauge it. But more importantly, there has

Requests to Charge and Exceptions

been no (347) proof in this case that he lost even one day's work as a result of this incident, and therefore I believe there has been no foundation for that kind of charge

The Court: The only thing is, he said he worked and at times when he worked he hurt, and I think an inference can be drawn from that that he was not able to keep up. He did say something about that, I remember something in the testimony. You have your exception.

Mr. Siracuse: I respectfully except.

The Court: Any requests for supplementary instruc-

Mr. Chayt: No, your Honor.

Mr. Siracuse: No, sir. Thank you very much.

(349) (The two alternates retired. At 4:45 p.m. a note was received.)

The Court: I have received a note from the jury. Miss Kruger has marked it Court's Exhibit 1. "We would like to see photographs of the intersection. Two, the diagrams of the intersection."

(Court Exhibit 1 marked.)

The Court: Those exhibits are Plaintiff's Exhibits 1-A through D and 2.

Mr. Siracuse: I have been informed in my absence that the jury made a request for Exhibits 1 and 2 and that the Judge without my presence allowed the exhibits to go before the jury. To this I have no objection.

(Recess.)

Verdict

(At 6:10 p.m. the jury arrived at a verdict.)

The Court: Gentlemen, I have received a note from the jury which reads as follows: "We have reached a verdict."

I don't see any need to mark this particular note, do you?

Mr. Siracuse: No, sir.

Mr. Chayt: No reason whatsoever. (The jury entered the courtroom.)

The Court: Miss Kruger, would you proceed (350) with the taking of the verdict.

The Clerk: Members of the jury, will you please answer as your name is called.

(Roll called-all present.)

The Clerk: Mr. Foreman, has the jury agreed upon a verdict?

The Foreman: We have.

The Clerk: What is your verdict, for plaintiff or defendant, number one?

The Foreman: We find the defendant guilty of negligence.

The Court: You find that the defendant was negligent. There is no issue, as I recall it, of contributory negligence, and I would ask if the jury finds the negligence to be a proximate cause of the injuries sustained by the plaintiff?

The Foreman: They did.

The Court: I will ask the jury the final question: Has the jury agreed upon a verdict regarding damages?

The Foreman: We have, your Honor.

The Court: Is your verdict for the plaintiff?

The Foreman: It is.

The Court: In what amount?

Verdict

(351) The Foreman: \$75,000.

The Clerk: Ladies and gentlemen of the jury, listen to your verdict as it now stands recorded: You say you find for the plaintiff in the amount of \$75,000, and so say you all.

The Court: Mr. Siracuse, do you wish the jury to be

polled?

Mr. Siracuse: Yes, sir.

The Court: Very well. Ladies and gentlemen, your foreman has reported that you unanimously agreed upon

a verdict for the plaintiff in the sum of \$75,000.

Miss Kruger will now call each of your names and will inquire whether the verdict for the plaintiff in the amount of \$75,000 is your verdict. If it is, please answer yes. If not, please indicate no.

(Each juror, upon being asked, "Is that your verdict?"

responded in the affirmative.)

The Clerk: So say you all.

The Court: At this time I would like to discharge the jury with the thanks of the Court. I never tell a jury whether I agree or disagree with its verdict. I only indicate if I feel the jurors have given careful attention to the case at hand. I have observed this jury in the few days this case has been on trial and I can tell you all that (352) it was my observation that each of you paid strict attention to the evidence and I am certain to the lawyers in their summations and also to the Court in its charge. Our system works when persons such as yourselves give of their time and effort to come here and discharge their duties as jurors.

I want to take this opportunity to thank each and every one of you for your service in this case and to this Court. You are discharged with the thanks of the Court.

Mr. Chavt: Counsel, if we may too, your Honor.

The Court: Yes, you may.

Mr. Siracuse: Thank you, ladies and gentlemen.

(The jury was discharged and left the courtroom.)

Motion to Set Verdict Aside

The Court: The Court is prepared to entertain any motions which counsel wish to make at this time. Thereafter I will adjourn court.

Mr. Siracuse: Thank you. If it please your Honor, the defendant respectfully moves to set this verdict aside on the ground that it is contrary to law. contrary to evidence, and all provisions under the appropriate sections of the law. Most particularly, if it please your Honor, on the ground that the amount is excessive.

Mr. Chayt: If your Honor please, plaintiff has (353) no motions to make at this time. I don't know if a comment on the defendant's request is warranted.

The Court: You might comment briefly on the last part of the application which is that the amount is excessive.

Mr. Chavt: With respect to that, your Honor, I might say that in this instance we have a concession that this man has a permanent injury, although there is a dispute as to the extent of it. The jury is entitled to have foundthey found that he had the separation fractures of the transverse process and even conceded, and from the jury's verdict we can infer that they found that this man had injury in fact of at least four vertebrae, the four that I sought to plead, and without regard to the fifth that I'm afraid I overlooked in my papers, not that the client overlooked. You have a permanent situation here which obviously affects that young man and will for the rest of his life, and I think the jury did and bad a right to take this into consideration; and I think a verdict in excess of 75,000 would not have been excessive in the light of the effect on this man.

I am in a sense placed in this way, it's that much more dramatic when a person comes in minus a leg to show the extent of disability on him. Here you have an absent plaintiff and you have an injury which is not that (354) visible except for the X-rays which we have here to dramatize it. And apparently this jury took it into consideration in cognizance of what effects on this young man will be years after they have forgotten about it.

Motions

The Court: The Court believes the injuries justified the award of the jury. The Court does not find the award so excessive as to warrant a reduction of the jury's verdict. Accordingly, the defendant's motion is denied.

Mr. Siracuse: I respectfully except, your Honor.

May we have a stay in execution, if it please your Honor, for thirty days and sixty days to make a case for appeal purposes.

The Court: Let me hear from your adversary on the

stay of execution.

Mr. Chayt: The plaintiff has no objection to the request which is ordinarily done automatically in the State Court, your Honor, and I have no objection here to afford the

defendant that opportunity.

The Court: Turning to the other matter, the appeal. I am not familiar with that 30-60 day custom. Here in a civil case you have thirty days from the entry of judgment, which will probably be tomorrow, to file your notice (355) of appeal, and thereafter, of course, you come within the Federal Rules of Appellate Procedure regarding the matter of docketing your record and serving your brief. I would suggest that I will direct a stay of execution of the judgment for thirty days and then you move the Court to all remedies which follow thereafter.

I suggest that the attorneys speak with the judgment clerk tomorrow so that there are no slipups, but I'm sure that Mr. Chayt will not execute within the next thirty days even if there is an administrative slipup.

Anything further, gentlemen?

Mr. Siracuse: Nothing from my part except to say thanks to the Court.

Mr. Chayt: May I say to your Honor that I intend to convey to my client the assurance that although he was not here he got as fair a trial as I have ever seen extended to anyone in this court—not only in this court, but in my experience.

The Court: Thank you, gentlemen.

Judgment Appealed From.

UNITED STATES DISTRICT COURT,

SOURTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

The issues in the above entitled action having been brought on regularly for trial, before the Honorable Robert J. Ward, United States District Judge, and a jury, on September 23 and 27, 1976, and the jury having returned a verdict in favor of the plaintiff, it is,

ORDERED, ADJUDGED and DECREED: That plaintiff Ytzhak Harel have judgment against defendant Harry Diamond in the amount of \$75,000. and it is further,

Ordered: That execution of judgment is stayed pending appeal.

Dated: New York, N. Y. September 28, 1976

RAYMOND F. BURGHARDT

Clerk

10/12/76—No appearance in opposition. Bill of Costs as taxed in the sum of \$447.34, in favor of plaintiff, and added to the judgment.

RAYMOND F. BURGHARDT Clerk

(An extract of the minutes)

Notice of Appeal to a Court of Appeals From a Judgment of a District Court.

UNITED STATES DISTRICT COURT,

SOURTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Notice is hereby given that Harry Diamond, defendant above named, hereby appeals to the United States Court of Appeals for the 2nd Circuit from the final judgment entered in favor of the plaintiff for Seventy-five Thousand (\$75,000) Dollars, on September 27, 1976, on the grounds that said judgment is excessive.

Dated: New York, New York October 25, 1976

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(An extract of the minutes)

the within appendix in bereby admitted this 21

1. January 19,7

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